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Supreme Court, U.S.
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No. 08-____

In The
Supreme Court of the United States

MAYER UNIFIED SCHOOL DISTRICT AND GADSDEN ELEMENTARY SCHOOL DISTRICT,

Petitioners,

V.

ARIZONA STATE LAND COMMISSIONER, THE ARIZONA STATE LAND DEPARTMENT, THE STATE OF ARIZONA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Supreme Court violated the Supremacy Clause when it applied a state law statute of limitations to avoid requiring the State of Arizona to comply with this Court's decision in *Lassen v. Arizona,* 385 U.S. 458 (1967) and the express provision of the New Mexico-Arizona Enabling Act that conveyances made without consideration are null and void, thereby depriving Arizona's public schools of millions of dollars in compensation that they are guaranteed by that Act.

LIST OF PARTIES

The following individuals and entities are parties to the proceedings in the court below:

Mayer Unified School District and Gadsden Elementary School District, *Plaintiffs-Appellants.*

Mark Winkleman, in his capacity as the Arizona State Land Commissioner, the Arizona State Land Department, The State of Arizona, Apache County, Cochise County, Coconino County, Graham County, Greenlee County, Maricopa County, Mohave County, Navajo County, Pima County, Pinal County, Santa Cruz County, Yavapai County, Yuma County, Maricopa County Flood Control District, Arizona Department of Transportation, Town of Carefree, City of Tucson, City of Flagstaff, Town of Gila Bend, City of Glendale, City of Globe, Magma Flood Control District, Town of Marana, City of Peoria, City of Phoenix, City of Scottsdale, City of Sierra Vista, and City of Tempe, *Defendants-Appellees.*

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mayer Unifed School Distrct and Gadsden Elementary School District respectfully request that this Court grant the petition for certiorari to review the decision and judgment of the Arizona Supreme Court.

OPINIONS BELOW

The Opinion of the Arizona Supreme Court is reported at 201 P. 3d 523 (Ariz. 2009) and is reproduced in the Appendix to this Petition ("Pet. App.") at App. 1 to App. 15. The Arizona Supreme Court's denial of rehearing is unpublished and appears at Pet. App. 80. The decision of the Arizona Court of Appeals, Division Two is reported at 2008 Ariz. App. Lexis 133 and is reproduced at Pet. App. 16 to App. 67. The decision of the Arizona Superior Court dismissing plaintiffs' complaint appears at Pet. App. 68.

JURISDICTION

The Arizona Supreme Court issued its Opinion on February 13, 2009, Pet. App. 1 to App. 15, and denied a Motion for Reconsideration on March 9, 2009. Pet. App. 80. This Court has jurisdiction over this petition for certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 28 of the Arizona-New Mexico Enabling Act, 36 U.S. Stat. 557, 568-579 (1910) provides in pertinent part:

> Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

Section 12-821 of the Arizona Revised Statutes provides:

> 12-821. General limitation; public employee
>
> All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.

STATEMENT OF THE CASE

This case once again presents this Court with the Arizona Supreme Court's refusal to enforce the stringent requirements of the Arizona-New Mexico Enabling Act against the State of Arizona, even though acceptance of the Act's restrictions was a condition of statehood and the state's noncompliance wrongfully deprives the trust beneficiaries of millions of dollars in compensation that Congress intended for them. *See Lassen v. Arizona,* 385 U.S. 458 (1967). In *Lassen,* the Arizona court had refused to enforce the requirement that any conveyances of state trust land be supported by fair consideration. *Id.* This time, the court has refused to enforce the requirement that conveyances not supported by compensation are null and void. Because the Arizona court has once again refused to enforce the Act as Congress intended, it is this Court and this Court alone that can ensure that the State of Arizona complies with the terms of the land grant and that the beneficiaries are protected from the dereliction of state officials.

Under the Arizona-New Mexico Enabling Act of 1910, approximately 10 million acres of federal land in Arizona were conveyed to the state upon its admission to the Union. The Enabling Act provided that the land conveyed to Arizona was to be held in trust for the benefit of Arizona's public schools, universities and other public institutions.

Beginning in 1929, the Arizona State Land Department began issuing perpetual easements over State Trust Lands to governmental entities, mostly for the purposes of road construction. Up until 1967, the state took the view that compensation for such

easements was not required because the value of trust lands was enhanced by highway access. Thus, the state argued, the right of way constituted an overall benefit to the trust that negated any requirement of compensation. For almost thirty years, this position was repeatedly sanctioned by the Arizona Supreme Court. *State v. Lassen*, 99 Ariz. 161, 166, 407 P.2d 747, 750 (1965); *Conway v. State Land Dep't*, 62 Ariz. 248, 249-50, 156 P.2d 901, 902 (1945); *Grossetta v. Choate*, 51 Ariz. 248, 250, 75 P.2d 1031, 1031-32 (1938).

In 1967, however, this Court explicitly rejected both the state's argument and the Arizona Supreme Court's interpretation of the Enabling Act. *Lassen*, 385 U.S. at 470. In *Lassen* the Court held that "Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands." *Id.* In reaching this conclusion, the Court reviewed the legislative history of the Act, focusing on the purpose of these restrictions and the fact that as more states were admitted to the Union, the restrictions that Congress placed upon the land grants to those states had become "steadily more rigid and specific." *Id.* at 467. The Court observed that "[a]ll [of] these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries *and that only those beneficiaries profit from the trust.*" *Id.* at 467 (emphasis added).

Ultimately, the Court found that the Arizona Court's presumption of enhanced value was insufficient to satisfy the requirements of the Enabling Act because "the purposes of Congress require that the Act's designated beneficiaries 'derive the full benefit'

of the grant." *Id.* at 468. Thus, the Court found that the Act "unequivocally demands" that the trust receive the full value of transferred lands and that the compensation be used exclusively for the purposes of the land trust. *Id.* at 466-67.

At the time that *Lassen* was decided, the State Land Department had granted approximately 900 easements over 46,767.87 acres of State Trust Land without obtaining compensation ("'09 easements").[1] Although the State Land Department followed the *Lassen* decision on a going-forward basis, it never obtained compensation for the Trust for the hundreds of easements that had been granted prior to the Court's decision despite the fact that: 1) according to the express terms of the Arizona-New Mexico Enabling Act, any easements that were granted without obtaining required compensation were null and void; and 2) both the grantees and the State Land Department continued to treat the easements as though they were valid. Thus, for more than forty years, the State Land Department allowed the state, county and municipal governments to exercise dominion over nearly 50,000 acres of State Trust Land without having paid any compensation in direct contravention of this Court's holding in *Lassen*.

The state made no effort to recover compensation for any of these pre-existing '09 easements until

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[1] Although the state apparently brought the existence of these easements to the attention of the Court in argument, because the specific focus in *Lassen* was a rule recently adopted by the Commissioner that required the payment of compensation for any new rights of way, the validity of the existing easements was not an issue before the Court. *See Lassen*, 385 U.S. at 469, n. 22.

2001, and even then it only took action with respect to one easement holder, the Flood Control District of Maricopa County ("FCD"). In a letter dated October 11, 2001, the State Land Commissioner informed the FCD that the easements previously granted to it violated the Enabling Act because they were made without any financial consideration and were therefore "void from their inception." Letter from Michael E. Anable dated October 11, 2001 at 1. Thus, he concluded that "appropriate action should be taken to bring the District's continuing use of such lands into compliance with the Enabling Act, and the District should pay the trust appropriate compensation for its past, present and future use of such state trust lands." *Id.*

On October 15, 2004, plaintiffs filed their complaint seeking to compel the Commissioner to obtain compensation for all of the '09 easements to the extent they were dispositions of state trust land that were made in violation of the Enabling Act.[2] The state defendants moved to dismiss the complaint based on statute of limitations and standing. They also moved to compel the joinder of the '09 easement holders or in the alternative to dismiss. The trial court denied the motions to dismiss but ordered joinder of the easement holders.

On April 20, 2006, the plaintiffs filed a second amended complaint that included the '09 easement holders as defendants. Thereafter, several of the

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[2] The original plaintiffs were Arizona taxpayers and parents of children in Arizona public schools. The school district plaintiffs were added to eliminate a standing issue raised by the state in its Motion to Dismiss.

easement defendants filed motions to dismiss asserting, *inter alia*, that the doctrine of laches barred the plaintiffs' complaint, that the complaint failed to state a claim because the decision in *Lassen* applied only prospectively and not retroactively, and that the school district plaintiffs lacked standing. The trial court granted the motion to dismiss based on laches. Pet. App. 68. Plaintiffs appealed.

The Court of Appeals affirmed the dismissal by the trial court but on different grounds. Pet. App. 16. The appellate court held that plaintiffs' claims were not barred by laches, but that dismissal was nonetheless appropriate because the *Lassen* decision should not be applied "retroactively." In reaching its conclusion, the Court of Appeals applied the state's retroactivity doctrine, a three-part test set out in *Fain Land and Cattle Co. v. Hassell,* 163 Ariz. 587, 790 P.2d 242 (1990). Pet. App. 62-65, ¶¶72-77. As the Court of Appeals noted, however, that test is based on a federal decision, *Chevron Oil Co. v. Huson,* 404 U.S. 9, 106-7 (1971), which has subsequently been disapproved by this Court. Pet. App. 63, fn. 10.

The plaintiffs petitioned the Arizona Supreme Court for review arguing that the Court of Appeals' application of the state's retroactivity doctrine to *Lassen,* a federal case, violated the Supremacy Clause and was contrary to this Court's holding in *Harper v. Va. Dep't of Taxation,* 509 U.S. 860, 100 (1993). The Arizona Supreme Court granted review and vacated the Court of Appeals' decision, but affirmed the dismissal of the action by the trial court on the grounds that the plaintiffs' claims were barred by a one year state statute of limitations. Pet. App. 1 through App. 14. The Arizona Court held that any

claims that plaintiffs had against the trustee for conveying the easements without obtaining compensation arose when the transfers were made, or at the latest, when this Court ruled in *Lassen* that the Enabling Act required the payment of actual compensation. Pet. App. 14. Thus, the Arizona Court concluded that because the plaintiffs did not bring their action within one year of this Court's decision, it was time-barred.

In its analysis, however, the Arizona Court did not address the fact that under the express terms of the Enabling Act any easements that were granted without compensation were "null and void." *Id.* Nor did the Arizona Court consider the fact that the purported easement-holders continue to make use of nearly 50,000 acres of State Trust Land even though they have never paid compensation for that use. Only by ignoring these critical facts could the Arizona Court conclude that "the violation here...occurred once, when the '09 easements were granted, even though the cause of action did not accrue until 1967." Pet. App. 14.

REASONS FOR GRANTING THE PETITION

I. As This Court Made Clear In *Lassen v. Arizona*, the United States Has a Continuing Interest in Enforcing the Strict Provisions that Congress Included in the Enabling Act to Prevent Abuse by the States.

A. The Enabling Act and Arizona State Trust Lands.

In 1910, the Arizona-New Mexico Enabling Act was enacted, authorizing the people of the territories of Arizona and New Mexico to form state governments. Act of June 20, 1910, Pub.L. No. 219 (ch. 310), 36 Stat. 557 ("Enabling Act"). Pursuant to the Enabling Act, the United States granted four sections of land in each township to Arizona. Almost ten million acres were granted. Today, the school land trust encompasses approximately 9.2 million acres. Arizona Auditor General, "A Performance Audit And Sunset Review Of The State Land Department," at 1 (2007)(available at http://www.azauditor.gov/Reports/State_Agencies/Agencies/Land_Department/Performance/07-08/07-08.pdf.) The land is held in trust for thirteen designated beneficiaries who receive the revenues obtained from the sale or lease of the trust lands. The "Common Schools," or public schools for grades K-12, are the trust's largest beneficiary, receiving close to 90 percent of the trust revenues from approximately 87 percent of the land. *Id.*

In order for Arizona to be admitted to the Union, the Enabling Act required Arizona to approve a constitution accepting the grants from the United States and agreeing to the restrictions that were

imposed on disposition of those lands. As a result, the Arizona Constitution established the Permanent State School Fund, which consisted of proceeds from the sale of public school lands or other public lands specified in the Enabling Act. Revenue for the maintenance of the respective state educational institutions that were the beneficiaries of the trust was to be derived from "the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the Enabling Act . . . ." Ariz. Const., Art. 11, § 10 The proceeds from the sales themselves are not distributed for the benefit of state educational institutions, only the investment proceeds from those sales. Enabling Act, § 25.

The income from state trust lands has never been sufficient by itself to fully fund Arizona's public schools. For example, for fiscal year 2007, income from state trust lands amounted to $85.2 million but appropriations for the K-12 public school system totaled $4 billion dollars. Before 2001, the legislature would simply apply the revenue from state trust lands as an offset against the total amount that the legislature had decided to provide in funding for Arizona public schools. The net effect was that the amount of funding for schools was fixed and any increase in state trust land income simply meant that the legislature could appropriate a lesser amount of money from the state's general fund.

That changed in 2001 when Arizona voters approved a statute that capped the amount of the state trust land fund that could be used as an offset to fund basic state aid to Arizona public schools. As a result, since 2002, Arizona school districts have received additional funds totaling more than $200

million dollars from the State Land Trust.[3] Importantly, the legislature has no discretion over this funding.

Of the twenty-three states that were given land grants by the federal government, Arizona has conserved the greatest percentage of its original federal land grant (88%). Lincoln Institute of Land Policy/ Sonoran Institute, "Trust Lands in the American West: Public Values in a Changing Landscape," p. 54 (2005) available at http://www.lincolninst.edu/subcenters/managing-state-trust-lands/ (hereinafter "Lincoln Institute Report"). In fact, the Arizona State Land Department actually sells a relatively small amount of land each year. Over the past ten years, the annual average has been about 5,000 acres statewide. Yet even this small acreage generates a substantial amount of income for the trust. For example, in 2001, only 3,500 acres were sold but those auctions earned $148 million for the Trust. http://www.land.state.az.us/news/ataglance.htm. The trust also receives significant income from the lease and sale of right of ways. In 2008, the Department brought in a record $77.6 million from rights of way. Arizona State Land Department Annual Report 2007-2008 at 1. Of that, $56,093,887.78 represents principal from rights of way sales. *Id.* at 34. The numbers for 2007 are similar, with the trust receiving a principal amount of $24,345,307.54 from

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[3] According to the State Land Department's Annual Reports, the amounts deposited into the Classroom Site Fund by the State Land Trust since 2001 are as follows: 2002 - $13.6 million; 2003 - $20.8 million; 2005 - $12.9 million; 2006 - $17.8 million; 2007 - $67.0 million; and 2008 - $101.4 million.

rights of way sales. Arizona State Land Department Annual Report 2006-2007 at 34.

B. The Federal Government Has a Strong Interest in Ensuring that Arizona Complies with the Requirements of the Enabling Act.

As this Court recognized in *Lassen v. Arizona*, when it first addressed the issue of granting public rights of way over state trust land:

> The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State. The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union. Although the terms of these grants differ, at least the most recent commonly make clear that *the United States has a continuing interest in the administration of both the lands and the funds which derive from them*. . . . We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands.

385 U.S. 460-61 (emphasis added).

Indeed, since *Lassen*, this Court has on at least two occasions reiterated that federal interest in ensuring that Arizona complies with the requirements that Congress included in Enabling Act so that the beneficiaries receive the full benefits to which they are entitled. *See Alamo Land & Cattle*

Co. v. Arizona, 424 U.S. 295, 302 (1976)("The Court's concern for the integrity of the conditions imposed by the Act has long been evident."); *Asarco Inc. v. Kadish*, 409 U.S. 605, 633 (1989)(same).

Moreover, this interest is not limited to the conduct of Arizona. As noted earlier, there are twenty-three states that received land grants from Congress. Many of those grants are subject to restrictions similar to those included in the Arizona-New Mexico Act.[4] If this Court allows Arizona to invoke state law to override the express provisions of its Enabling Act, what is to prevent New Mexico, Utah, Colorado, or Washington, or any of the other land grant recipients from doing the same thing? If state law can be used to circumvent the stringent requirements that Congress imposed as a condition of its grant to Arizona, there is nothing to stop states similarly constrained from adopting all sorts of procedural and substantive hurdles to avoid the accountability that the strict provisions of §28 were intended to ensure.

Because the Arizona Supreme Court has failed and refused to compel the State Land Commissioner

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[4] Although twenty three states continue to hold some portion of their grant lands, the vast majority of state trust lands are located in western states. Lincoln Institute Report at 54. In the lower forty-eight states, Arizona and New Mexico have the largest holdings of state trust lands, with approximately 9.3 million and 9 million acres, respectively. *Id.* Nine states – Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming – together hold almost 40 million acres. Although the particular terms of their respective Enabling Acts vary, most of these states are subject to federal restrictions regarding the disposition of state trust land. *See id.* at 62-63 (Arizona); 76 (Colorado); 88 (Idaho); 98 (Montana); 110 (New Mexico); 146 (Washington); and 160 (Wyoming).

to comply with the compensataion requirement imposed by the Enabling Act and affirmed by this Court in *Lassen v. Arizona*, it is left to this Court to once again ensure that the will of Congress is not thwarted by Arizona officials to the detriment of the trust beneficiaries.

II. When it Applied the Statute of Limitations to Bar the Plaintiffs' Claims, the Arizona Supreme Court Violated Express Provisions of the Enabling Act.

A. The Arizona Court Failed to Treat the '09 Easements as Null and Void.

In holding that plaintiffs' claim for breach of fiduciary duty accrued in 1967 when *Lassen v. Arizona* was decided and that the claim was now time barred, the Arizona Court treated the '09 easements as any other conveyance and ignored entirely the fact that under the express terms of the Enabling Act, the trustee's failure to obtain compensation rendered them null and void. In its decision, the Arizona court does not even address the legal significance of that important fact—one that makes this case both unique and distinguishable from the authority relied upon by the state court for its holding.

In its decision, the Arizona Court relied upon *Mitchell v. United States* 13 Cl. Ct. 474, 480-482 (1987) for the proposition that the duty to secure compensation arises only at the time the right-of-way is granted. Pet. App. 14. It concluded that "the violation here also occurred once, when the '09 easements were granted." *Id.* What the Arizona Court ignored, however, is the legal effect of that violation and how that effect impacts the current situation.

In *Mitchell,* the applicable statute provided "[n]o grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just." 25 U.S.C. §325. However, the statute at issue in *Mitchell* did *not* provide that rights of way granted in violation of this provision were "null and void." The Enabling Act does contain such a provision. Thus, the fact that the initial violation of the Enabling Act occurred when the easements were granted does not resolve the issue presented in this case because, unlike the rights of way in *Mitchell,* the easements that the trustee attempted to convey were and are a nullity.

That Congress had the discretion to impose this restriction when it made the grant to Arizona is undisputed:

> The power over the public land . . . entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

United States v. City and County of San Francisco, 310 U.S. 16 (1940)(citations omitted) quoting *Light v. United States,* 220 U.S. 523, 537 (1911). Nor is there any question that the Arizona court is obligated to give effect to those provisions. U. S. Const., Art. VI, Cl. 2.

In this case, however, the Arizona court violated the Supremacy Clause when it ignored the null and void provision of the Enabling Act. That in turn allowed the court to ignore the true nature of plain-

tiffs' claims and avoid confronting the problem presented by the easement holders' ongoing use of what is still unencumbered state trust land without payment of consideration. Had the court acknowledged that the attempted transfers were null and void, it would also have had to acknowledge that the state is allowing others to use the property without paying compensation—in violation of the Enabling Act. Every time the State Land Commissioner allows uncompensated use of trust property, it is another breach of the trust. However, by ignoring the effect of the original violation, the Arizona court dismissed the continuing nature of the breach and avoided enforcing the express provisions of the Enabling Act.

B. The Arizona Court Also Ignored the Express Provision of the Enabling Act that the Easements are Null and Void *Notwithstanding any State Law to the Contrary.*

By invoking the state statute of limitations to bar plaintiffs' claims, the Arizona court also violated the provision in the Enabling Act that expressly provides that its null and void requirement supersedes any state law. The Act states that every disposition of the trust land or its products "not made in substantial conformity with the provisions of this Act shall be null and void, *any provisions of the constitution or laws of the said State to the contrary notwithstanding.*" Enabling Act, §28 at ¶8 (emphasis added). Because the Supremacy Clause requires the Arizona court to comply with the Enabling Act, it was obligated to abide by this provision and did not have the authority to invoke a *state* statute of limitations to avoid enforcing the express terms of the Act.

As this Court observed in *Oregon & California Railroad Co. v. United States*, 283 U. S. 393 (1915) when it was considering a similarly restricted land grant made to the railroads:

> [T]he acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel *and even to the defenses of laches and the statute of limitations.* The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application.

283 U.S. at 427 (emphasis added). In enforcing the restrictions in that case, this Court recognized its own limitation in construing the land grant legislation. *Id.* at 436 ("[In construing land grant statutes,] we cannot. . .give a greater sanction to them than Congress intended, nor give . . .a right which the granting acts did not confer . . . .") Where Congress has spoken, it is the Court's obligation to give effect to its intent. *Id.*

Yet, in holding that the plaintiffs' action was time-barred, the Arizona court did precisely what this Court declined to do in *Oregon & California Railroad*. It substituted its judgment for that of Congress. It not only used state law to override an express provision of a federal statute enacted by Congress—which would itself be a violation of the Supremacy Clause—it did so where the particular statute *expressly forbids* the invocation of state law

to avoid its strict provisions. In short, the Arizona court's decision is a direct and straightforward violation of the Supremacy Clause.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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June 8, 2009

MAYER UNIFIED SCHOOL DISTRICT AND GADSEN ELEMENTARY SCHOOL DISTRICT, PLAINTIFFS/APPELLANTS, V. MARK WINKLEMAN, IN HIS CAPACITY AS STATE LAND COMMISSIONER; THE ARIZONA STATE LAND DEPARTMENT; THE STATE OF ARIZONA; APACHE COUNTY; COCHISE COUNTY; COCONINO COUNTY; GRAHAM COUNTY; GREENLEE COUNTY; MARICOPA COUNTY; MOHAVE COUNTY; NAVAJO COUNTY; PIMA COUNTY; PINAL COUNTY; SANTA CRUZ COUNTY; YAVAPAI COUNTY; YUMA COUNTY; MARICOPA COUNTY FLOOD CONTROL DISTRICT; ARIZONA DEPARTMENT OF TRANSPORTATION; TOWN OF CAREFREE; CITY OF TUCSON; CITY OF FLAGSTAFF; TOWN OF GILA BEND; CITY OF GLENDALE; CITY OF GLOBE; MAGMA FLOOD CONTROL DISTRICT; TOWN OF MARANA; CITY OF PEORIA; CITY OF PHOENIX; CITY OF SCOTTSDALE; CITY OF SIERRA VISTA; AND CITY OF TEMPE, DEFENDANTS/APPELLEES. MAYER UNIFIED SCHOOL DISTRICT AND GADSEN ELEMENTARY SCHOOL DISTRICT, PLAINTIFFS/APPELLANTS/CROSS-APPELLEES, V. CITY OF PEORIA AND CITY OF SCOTTSDALE, DEFENDANTS/APPELLEES/CROSS-APPELLANTS.

ARIZONA SUPREME COURT NO. CV-08-0225-PR

SUPREME COURT OF ARIZONA

201 P.3D 523; 2009 ARIZ. LEXIS 50; 550 ARIZ. ADV. REP. 28

FEBRUARY 13, 2009, FILED

PRIOR HISTORY:

Court of Appeals Division Two No. 2 CA-CV 07-0126. Maricopa County Superior Court No. CV2004-020078. Appeal from the Superior Court in Maricopa County. The Honorable Ruth Harris Hilliard, Judge. Opinion of the Court of Appeals, Division Two, __ Ariz. ___, ____ P. 3d. ____, 2008 Ariz. App. LEXIS 133 (App. 2008), 2008 WL 2128064 (May 19, 2008).

Mayer Unified Sch. Dist. v. Winkleman, 2008 Ariz. App. LEXIS 133 (Ariz. Ct. App., May 19, 2008)

DISPOSITION: Appeal from the Superior Court in Maricopa County, AFFIRMED. Opinion of the Court of Appeals, Division Two, VACATED.

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For City of Scottsdale: Robert Bruce Washburn, Senior Assistant City Attorney, DEBORAH W. ROBBERSON, SCOTTSDALE CITY ATTORNEY, Scottsdale.

For Magma Flood Control District:Stephen R. Cooper, COOPER & RUETER, L.L.P., Casa Grande.

For Coconino County: Jean E. Wilcox, Deputy County Attorney, TERENCE C. HANCE, COCONINO COUNTY ATTORNEY, Flagstaff.

For Maricopa County and Flood Control District of Maricopa County: Richard A. Segal, Richard B. Hood, Craig A. McCarthy, GUST ROSENFELD, P.L.C., Phoenix.

JUDGES: Rebecca White Berch, Vice Chief Justice. CONCURRING: Ruth V. McGregor, Chief Justice, Michael D. Ryan, Justice, W. Scott Bales, Justice. HURWITZ, Justice, concurring in part and concurring in the result.

OPINION BY: Rebecca White Berch

OPINION

En Banc

OPINION

BERCH, Vice Chief Justice

P1 We have been asked to decide whether suit will lie under the Arizona-New Mexico Enabling Act for the State Land Commissioner's failure to require compensation for easements and rights of way over state trust lands conveyed between 1929 and 1967. We hold that the claims are time-barred.

I. FACTUAL AND PROCEDURAL BACKGROUND

P2 The Arizona-New Mexico Enabling Act granted nearly ten million acres of land to the State of Arizona to be held in trust for the support of public schools. See Act of June 20, 1910, ch. 310, §§ 24, 28, 36 Stat. 557, 572-74 ("Enabling Act"). The State Land Commissioner administers the school land trust. *Forest Guardians v. Wells, 201 Ariz. 255, 257, P 2, 34 P.3d 364, 366 (2001).* He serves as the trustee of the land trust and must "manage the trust lands for the benefit of the trust and trust beneficiaries." *Berry v. Ariz. State Land Dep't, 133 Ariz. 325, 327, 651 P.2d 853, 855 (1982).*

P3 Beginning in 1929, the Commissioner granted easements over some of these trust lands to various government entities, for roads and other public purposes, without requiring compensation to the

school land trust.[1] This practice continued until 1967, when the United States Supreme Court ruled that the Enabling Act requires compensation to the trust for the full value of any easements or uses of trust lands. *Lassen v. Ariz. ex rel. Ariz. Highway Dep't (Lassen II), 385 U.S. 458, 469, 87 S. Ct. 584, 17 L. Ed. 2d 515 & n.22 (1967).*

P4 Between 1929 and 1967, the Department conveyed more than nine hundred such easements (the "09 easements") to government entities without receiving compensation. Many of these easements remain in effect, although the trust has never been compensated for many of them.

P5 On June 4, 2003, counsel for Plaintiffs Mayer Unified School District and Gadsden Elementary School District (the "Districts") sent a letter to the Commissioner alleging that the school land trust had received no consideration for these easements and requesting further information regarding them. The Commissioner responded that he needed to review the easement records before answering. Discussions ensued, but the parties failed to resolve the issue. The plaintiffs then filed a complaint on October 15, 2004, more than one year after they sent the June 4th letter to the Commissioner inquiring about the status of the easements.[2] The complaint named as

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[1] For convenience we use the term easements to encompass both easements and rights of way. These easements became known as the "09 easements" based on the Land Department's classification number.

[2] The original complaint named several parents of Arizona public school children as plaintiffs, but they were later dis-

(continued on following page)

defendants the Land Department and its Commissioner and the State of Arizona. Twenty-eight easement holders were later joined as additional defendants.

P6 Various defendants filed motions to dismiss on several grounds, including laches, nonjusticiability, the statute of limitations, and lack of standing. They also claimed that *Lassen II* should not apply retroactively. The superior court granted the defendants' motions to dismiss based on laches. The court of appeals reversed the superior court's laches determination, but affirmed the dismissal on the alternative ground that *Lassen II* applied prospectively only, and therefore the Districts were not entitled to relief. *Mayer Unified Sch. Dist. v. Winkleman,___ Ariz.___ ,___, PP 65, 77-78, ___P.3d___, ___, 2008 Ariz. App. LEXIS 133, 2008 WL 2128064 (App. May 19, 2008).*

P7 We granted review of the issues raised in the Districts' petition for review and two issues raised in the State's cross-petition to decide questions of statewide importance. *See* ARCAP 23(c)(3). We have jurisdiction pursuant to *Article 6, Section 5(3) of the Arizona Constitution* and *Arizona Revised Statutes ("A.R.S.") section 12-120.24* (2003).

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missed from the action. An amended complaint, filed in January 2005, added the Districts as additional plaintiffs.

II. DISCUSSION

1. A. Enabling Act Background

P8 The Enabling Act created the school land trust and provides detailed instructions for disposing of trust lands. Enabling Act § 28. For example, trust lands must be "appraised at their true value" and cannot be sold for less than the appraised amount. *Id.* Nor may the State sell or lease trust lands "except to the highest and best bidder at a public auction." *Id.* Disposal of any trust land in a manner not substantially conforming to the provisions of the Enabling Act constitutes "a breach of trust" that renders the disposition of trust lands "null and void." *Id.* [3]

P9 The Enabling Act's disposition provisions have been the subject of recurring litigation with respect to easements granted to public entities. In *Grossetta v. Choate*, we were asked to decide whether the Land Department could grant easements over trust lands in the absence of specific authorization in the Enabling Act. *51 Ariz. 248, 250-51, 75 P.2d 1031, 1032 (1938)*. We held that the Enabling Act did not limit the Legislature's power "to grant rights of way easements over the public lands for public highways." *Id. at 254, 75 P.2d at 1033. Grossetta*, however, did not address whether easement holders had to compensate the school land trust for the easements.

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[3] For a more detailed exploration of the history of the Enabling Act and its provisions, see *Kadish v. Arizona State Land Department, 155 Ariz. 484, 486-88, 747 P.2d 1183, 1185-87 (1987), aff'd sub nom. Asarco Inc. v. Kadish, 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989), and Murphy v. State, 65 Ariz. 338, 344-53, 181 P.2d 336, 340-46 (1947).*

P10 We answered that question seven years later in *State ex rel. Conway v. State Land Department, 62 Ariz. 248, 156 P.2d 901 (1945). Conway* involved an order by the Commissioner requiring the State Highway Department to surrender all easements it held over trust lands. *Id. at 249-50, 156 P.2d at 902.* These easements would be reissued, at the Commissioner's option, as leases. *Id.* The Highway Department sought a declaratory judgment that the Commissioner lacked the authority to issue the order. *Id. at 249, 156 P.2d at 901.* We agreed and held that the Highway Department was "not required to pay . . . for the taking or use" of trust lands for building and maintaining state highways. *Id. at 255-56, 156 P.2d at 904.*

P11 The compensation issue came before this Court once again in 1965. In *State ex rel. Arizona Highway Department v. Lassen (Lassen I)*, we addressed whether the Commissioner could adopt a rule requiring compensation for public highway rights of way and material sites on trust lands. *99 Ariz. 161, 162, 407 P.2d 747, 747-48 (1965), rev'd 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967).* We prohibited adoption of the rule and held that the Commissioner must grant material sites and easements to the Highway Department without requiring compensation for the public use of the trust lands. *Id. at 168, 407 P.2d at 752.*

P12 The United States Supreme Court granted certiorari and reversed. *Lassen II, 385 U.S. at 470.* The Court held that the Highway Department must pay for the use of the trust lands, even though it was building and maintaining highways for the public's benefit. *Id. at 466.* After examining the Enabling Act's valuation and fund-usage provisions, as well as

its background and legislative history, the Court concluded that Congress intended the school land trust to "derive the full benefit of the [federal land] grant." *Id. at 466-68* (citation omitted). To further this purpose, it held that the Highway Department must "compensate the trust . . . for the full appraised value of any material sites or rights of way which it obtains on or over trust lands." *Id. at 469* (footnote omitted).

P13 The Court therefore permitted the Commissioner to issue the rule requiring compensation for public highway rights of way and material sites on trust lands. It explicitly declined, however, to decide whether compensation was owed for the more than nine hundred 09 easements that had been granted between 1929 and the date of its opinion in 1967.[4] It is those easements for which the Districts now seek compensation.

B. Statute of Limitations

P14 The defendants assert that the statute of limitations bars the Districts' claims for compensation for easements granted between 1929 and 1967. They

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[4] Immediately following its holding, the Supreme Court noted the following:

> We are informed by counsel that over a period of years Arizona has obtained the use of large areas of trust lands on bases that may not have accorded with those set forth in this opinion. We wish to make it plain that we do not reach either the validity of any such transfers or the obligations of the State, if any, with respect thereto.

Lassen II, 385 U.S. at 469 n.22.

reason that the Districts' cause of action accrued in 1967 when the Supreme Court published its opinion in *Lassen II* declaring that compensation was required for the easements.

P15 The parties do not dispute that *A.R.S. § 12-821* states the applicable limitations period.[5] *Section 12-821* requires that actions against a government entity "be brought within one year after the cause of action accrues and not afterward." *A.R.S. § 12-821* (2003) (current version of statute). "[A] cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." *Id. § 12-821.01(B).* The Districts filed their complaint on October 15, 2004. Therefore, the

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[5] We assume, therefore, that *§ 12-821* applies. We note, however, that the current version of that section was first enacted in 1994. *See* 1994 Ariz. Sess. Laws, ch. 162, § 1 (2d Reg. Sess.). But limitations statutes with similar provisions were in effect at all times relevant to this action, alleviating any harm in applying the terms of *§ 12-821. See, e.g., A.R.S. § 12-821* (1992) (repealed 1993) (twelve month statute of limitations for claims against a public entity); *§ 12-550* (1956) (four year general limitations period when no limitation is otherwise prescribed). In any event, once the new limitations statute became effective, the Districts had at most one year thereafter to bring their claims. *See A.R.S. § 12-505(B)* (2003); *see also City of Tucson v. Clear Channel Outdoor, Inc., 209 Ariz. 544, 554, P 42, 105 P.3d 1163, 1173 (2005).* Finally, the Districts have not questioned the applicability of the statute of limitations to them. *Cf. Tucson Unified Sch. Dist. v. Owens-Corning Fiberglass Corp.., 174 Ariz. 336, 337, 849 P.2d 790, 791 (1993)* (exempting school district from limitations period).

complaint is not timely unless the Districts' cause of action accrued after October 15, 2003.

C. When the Districts' Cause of Action Accrued

P16 The Districts' cause of action stems from the uncompensated conveyance of easements over trust lands between 1929 and 1967. Because this Court had held that no compensation was owed for the 09 easements, however, the Districts had no reason between 1929 and 1967 to know that the school trust had been damaged. *See Lassen I, 99 Ariz. at 166, 168, 407 P.2d at 750, 752*; *Conway, 62 Ariz. at 255-56, 156 P.2d at 904.* [6]

P17 But the Districts should reasonably have known that compensation for the easements was required and had not been paid by January 10, 1967, when the Supreme Court issued its opinion in *Lassen II, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515*, which held that government entities that acquire trust lands, even for uses that benefit the public, must compensate the school trust. *Id. at 468-69.* Our opinions in *Grossetta, 51 Ariz. at 254, 75 P.2d at*

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[6] Indeed, in *Lassen I*, we suggested that the highways built on the easements *enhanced* the value of the trust lands:

> Certainly, if the highways had not been established the values of these lands would have been much less. Nor does [the Commissioner] state whether the values estimated are those when the easements were first granted or as of the present time, after the values have been enhanced by the building of a highway system throughout this state.

99 Ariz. at 166, 407 P.2d at 750.

1033, Conway, 62 Ariz. at 251, 255-56, 156 P.2d at 902, 904, and *Lassen I, 99 Ariz. at 168, 407 P.2d at 752,* should have alerted the Districts that the Commissioner had granted easements to public entities without requiring compensation to the school trust between 1929 and 1965. These opinions put all trust beneficiaries, including the Districts, on notice that unpaid-for easements existed.

P18 The Supreme Court confirmed the existence of such easements in *Lassen II, 385 U.S. at 469 n.22.* Although *Lassen II* required the Highway Department to compensate the trust for future easements granted over trust lands, the Court refrained from deciding whether compensation was required for the 09 easements. *Id.* Thus, the *Lassen II* opinion placed the Districts on notice of past acquisitions of trust lands for which compensation might be owed but had not been paid. The repeated references by both this Court and the United States Supreme Court to the existence of easements conveyed without compensation lead us to conclude that reasonable persons either knew or should have known of such easements at the time of the *Lassen II* decision. The Districts' cause of action thus accrued at that time.[7]

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[7] Although we conclude that the cause of action accrued in 1967, it is indisputable that the Districts had actual notice of the 09 easements, and of the Commissioner's failure to obtain compensation for them, by June 2003, when the Districts' counsel sent a letter to the Commissioner stating his understanding that "none of the 985 [09] easements and rights of way issued by the Department to governmental and public entities were made in exchange for any financial consideration." Therefore, at the very latest, the Districts' cause of action accrued on June 4, 2003, more than one year before a complaint was filed.

P19 The Districts maintain that their claim should nonetheless not be barred because the Commissioner, as the trustee of the school land trust, has an ongoing duty to remedy violations of the Enabling Act. The Commissioner's failure to obtain compensation for the use of the easements constitutes a continuing violation that renders the statute of limitations inapplicable, the Districts assert, because a new claim arises each moment that the Commissioner fails to obtain value for the easements.

P20 We disagree. We find persuasive the opinion in *Mitchell v. United States, 13 Cl. Ct. 474 (1987)*. In that case, the court considered a similar "continuing violation" claim in the context of a trustee's duty to obtain adequate compensation for the use of trust lands. *Id. at 478*. There, the Bureau of Indian Affairs (the "BIA") served as the statutory trustee of a trust that benefited allottees of the Quinault Indian Reservation. *Id. at 476*. The allottees alleged that the BIA "collected inadequate fees from the logging companies for the private use of roads crossing the allottees' lands." *Id.* Like the Districts here, the allottees did not file suit within the statutory limitations period. *Id. at 478-79*. In an attempt to revive their time-barred claim, the allottees argued that even if they had constructive notice of the inadequate compensation claim, the statute of limitations should not preclude the claim because the trustee had a continuing duty to collect adequate compensation from the logging companies as timber was transported over rights of way on the allottees' lands. *Id. at 479*. The court rejected the allottees' continuing violation theory, reasoning that "the duty to secure compensation for a right-of-way arises only once -- at

the time the right-of-way is granted." *Id. at 480.* We agree that the violation here also occurred once, when the 09 easements were granted, even though the cause of action did not accrue until 1967.

P21 Because the Districts filed their complaint more than one year after their cause of action accrued, we hold that their claims are time-barred.

III. CONCLUSION

P22 For the foregoing reasons, we vacate the opinion of the court of appeals and affirm the judgment of the superior court.

Rebecca White Berch, Vice Chief Justice

CONCURRING:

Ruth V. McGregor, Chief Justice

Michael D. Ryan, Justice

W. Scott Bales, Justice

CONCUR BY: Andrew D. Hurwitz (In Part)

CONCUR

HURWITZ, Justice, concurring in part and concurring in the result

P23 The majority concludes that the Districts' cause of action accrued when the Supreme Court of the United States decided *Lassen v. Ariz. ex rel. Ariz. Highway Dep't (Lassen II), 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967).* I do not doubt that the relevant statute of limitations expired years before

this suit was filed. But I do not believe that we need to decide today that a "reasonable person" would have received constructive notice of potential claims on the very day *Lassen II* was decided from a footnote in that opinion. As the Court notes, by June 4, 2003, the Districts' counsel had *actual knowledge* of the facts underlying their claims. Op. P 18 n.8. Because this suit was filed more than a year later, I find it unnecessary to rely on a constructive notice fiction to set a precise earlier date of accrual. I therefore concur in PP 1-16 and 19-22 of the majority opinion and in the result.

Andrew D. Hurwitz, Justice

MAYER UNIFIED SCHOOL DISTRICT AND GADSEN ELEMENTARY SCHOOL DISTRICT, PLAINTIFFS/APPELLANTS,

V.

MARK WINKLEMAN, IN HIS CAPACITY AS STATE LAND COMMISSIONER; THE ARIZONA STATE LAND DEPARTMENT; THE STATE OF ARIZONA; APACHE COUNTY; COCHISE COUNTY; COCONINO COUNTY; GRAHAM COUNTY; GREENLEE COUNTY; MARICOPA COUNTY; MOHAVE COUNTY; NAVAJO COUNTY; PIMA COUNTY; PINAL COUNTY; SANTA CRUZ COUNTY; YAVAPAI COUNTY; YUMA COUNTY; MARICOPA COUNTY FLOOD CONTROL DISTRICT; ARIZONA DEPARTMENT OF TRANSPORTATION; TOWN OF CAREFREE; CITY OF TUCSON; CITY OF FLAGSTAFF; TOWN OF GILA BEND; CITY OF GLENDALE; CITY OF GLOBE; MAGMA FLOOD CONTROL DISTRICT; TOWN OF MARANA; CITY OF PEORIA; CITY OF PHOENIX; CITY OF SCOTTSDALE; CITY OF SIERRA VISTA; AND CITY OF TEMPE, DEFENDANTS/APPELLEES.

MAYER UNIFIED SCHOOL DISTRICT AND GADSEN ELEMENTARY SCHOOL DISTRICT, PLAINTIFFS/APPELLANTS/CROSS-APPELLEES, V. CITY OF PEORIA AND CITY OF SCOTTSDALE, DEFENDANTS/APPELLEES/CROSS-APPELLANTS.

2 CA-CV 2007-0126

COURT OF APPEALS OF ARIZONA, DIVISION TWO, DEPARTMENT B

MAY 19, 2008, FILED

SUBSEQUENT HISTORY: Review granted by, in part *Mayer USD v. Winkleman, 2008 Ariz. LEXIS 208 (Ariz., Oct. 28, 2008)*

Vacated by Mayer Unified Sch. Dist. v. Winkleman, 2009 Ariz. LEXIS 50 (Ariz., Feb. 13, 2009)

PRIOR HISTORY:

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY. Cause No. CV2004-020078. Honorable Ruth H. Hilliard, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For Plaintiffs/Appellants/Cross-Appellees: Arizona Center for Law in the Public Interest, Timothy M. Hogan and Joy Herr-Cardillo, Phoenix.

For Defendants/Appellees Mark Winkleman, Arizona State Land Department, and State of Arizona: Terry Goddard, Arizona Attorney General, William A. Richards, Patrick B. Sigl, and Kenneth D. Nyman, Phoenix.

For Defendant/Appellee Apache County: Criss E. Candelaria, Apache County Attorney, Edward W. France III, St. John's.

For Defendant/Appellee Cochise County: Edward G. Rheinheimer, Cochise County Attorney, Britt W. Hanson, Bisbee.

For Defendant/Appellee Coconino County: Terence C. Hance, Coconino County Attorney, Jean E. Wilcox, Flagstaff.

For Defendant/Appellee Graham County: Kenneth A. Angle, Graham County Attorney, Safford.

For Defendants/Appellees Maricopa County and Maricopa County Flood Control District: Gust Rosenfeld, P.L.C., Richard A. Segal, Richard B. Hood, and Craig A. McCarthy, Phoenix.

For Defendant/Appellee Mohave County: Matthew J. Smith, Mohave County Attorney, Robert A. Taylor, Kingman.

For Defendant/Appellee Navajo County: Melvin R. Bowers, Jr., Navajo County Attorney, Lance B. Payette, Holbrook.

For Defendant/Appellee Pima County: Barbara LaWall, Pima County Attorney, Nancy J. Davis, Tucson.

For Defendant/Appellee Pinal County: James P. Walsh, Pinal County Attorney, Chris M. Roll, Florence.

For Defendant/Appellee Yavapai County: Sheila Sullivan Polk, Yavapai County Attorney, Jack H. Fields, Prescott.

For Defendant/Appellee Yuma County: Jon R. Smith, Yuma County Attorney, Edward P. Feheley, Yuma.

For Defendant/Appellee Arizona Department of Transportation: Gallagher & Kennedy, P.A., Mark A. Fuller, Kevin E. O'Malley and C. Lincoln Combs, Phoenix.

For Defendants/Appellees Town of Carefree, City of Flagstaff, Town of Gila Bend, City of Glendale, City of Globe, Town of Marana, City of Phoenix, City of Sierra Vista, and City of Tempe: Moyes Storey Ltd., C. Brad Woodford, Phoenix.

For Defendant/Appellee Magma Flood Control District: Cooper & Rueter, L.L.P., Stephen R. Cooper, Casa Grande.

For Defendant/Appellee/Cross-Appellant City of Peoria: Stephen M. Kemp, Peoria City Attorney, Ellen M. Van Riper and Cynthia Odom, Peoria.

For Defendant/Appellee/Cross-Appellant City of Scottsdale: Deborah W. Robberson, Scottsdale City Attorney, Bruce Washburn, Scottsdale.

For Defendant/Appellee City of Tucson: Michael G. Rankin, Tucson City Attorney, Tobin Rosen, Tucson.

JUDGES: GARYE L. VASQUEZ, Judge. CONCURRING: PETER J. ECKERSTROM, Presiding Judge, PHILIP G. ESPINOSA, Judge.

OPINION BY: GARYE L. VASQUEZ

OPINION

VASQUEZ, Judge.

P1 In 2004, parents of children attending various public schools in Arizona, later joined by Mayer Unified School District and Gadsen Elementary School District("the school districts"), sued the State Land Commissioner, the Arizona State Land Department, and the State of Arizona, (collectively, "the State Defendants"), alleging these defendants had failed to obtain compensation from numerous easement holders who had been granted easements between 1929 and 1967 across state school trust lands, in violation of the Arizona-New Mexico Enabling Act, Act of June 20, 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557 ("Enabling Act"). The plaintiffs claimed the easements ("09 easements")[1] were void, the defendants had breached their fiduciary duty in conveying the easements without obtaining compensation, and the plaintiffs requested an accounting of the trust property and declaratory relief. After dismissing the parent plaintiffs for lack of standing and joining the various easement holders as defendants, the trial court dismissed the complaint on the ground that the claims were barred by the equitable doctrine of laches. The school districts appealed. We affirm, but for a different reason than that stated by the trial court.

I. Factual and Procedural Background

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[1] The parties use this designation for the group of easements at issue in this case. The number "09" is a State Land Department code used to identify easements of state trust lands that were granted to government bodies without compensation to the trust.

P2 In reviewing a trial court's order granting a motion to dismiss, we assume the facts alleged in the complaint are true. *Doeexrel. Doe v. State, 200 Ariz. 174, P 2, 24 P.3d 1269, 1270 (2001).* On October 15, 2004, individual plaintiffs, as residents of Arizona and parents of public school children, sued the State Defendants, alleging they had breached their duties as trustees of the state land trust by granting easements across state trust lands without obtaining compensation. In their prayer for relief, the plaintiffs requested an accounting, a declaration that the state had disposed of trust property without compensation in violation of the Enabling Act, rendering the dispositions null and void, and compensation to the trust for the value of the property.

P3 The State Defendants filed a motion to dismiss pursuant to *Rule 12(b)(6), Ariz. R. Civ. P.*, arguing the plaintiffs lacked standing, failed to file a notice of claim, and failed to file their lawsuit within the applicable statute of limitations period. They also separately moved to join all grantees of the disputed easements as indispensable parties pursuant to *Rule 19, Ariz. R. Civ. P.* The plaintiffs then filed an amended complaint, adding the school districts as plaintiffs and amending their claim for breach of fiduciary duty to include a request for an order requiring the state to obtain compensation for the trust from the easement holders or, alternatively, an order requiring the state to compensate the trust.

P4 The trial court denied the State Defendants' motion to dismiss, finding the action had been filed within the limitations period prescribed for claims against public entities, *see A.R.S. § 12-821*, and that the notice of claim statute did not apply to the plaintiffs' claims, *see A.R.S. § 12-821.01*. The court also

found the school district plaintiffs had standing to sue, while the parent plaintiffs did not. The court then granted the State Defendants' motion to join the individual easement grantees as defendants (collectively the "county-municipal defendants"), over the plaintiffs' objection.[2] The school districts filed a second amended complaint to include the county-municipal defendants, who answered the complaint and filed motions to dismiss based variously on the statute of limitations, notice of claim statute, laches, standing, justiciability of the claim, and the bona fide purchaser for value doctrine. The trial court specifically addressed each of the grounds on the merits and dismissed the lawsuit based on its conclusion that the claims were barred by laches. The court rejected all other grounds for dismissal raised by the defendants. The plaintiffs have appealed the court's order dismissing the case on laches grounds, and the defendants have filed various cross-appeals and asserted cross-issues, challenging the court's denial

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[2] The county-municipal defendants participating on appeal include: Apache County, Cochise County, Coconino County, Graham County, Greenlee County, Maricopa County, Mohave County, Navajo County, Pima County, Pinal County, Santa Cruz County, Yavapai County, Yuma County, Maricopa County Flood Control District, Magma Flood Control District, Arizona Department of Transportation (ADOT), Town of Carefree, Town of Gila Bend, City of Globe, City of Flagstaff, City of Glendale, Town of Marana, City of Peoria, City of Phoenix, City of Scottsdale, City of Sierra Vista, City of Tempe, and City of Tucson. The plaintiffs' second amended complaint also joined as defendants: Gila County, La Paz County, Chino Valley Irrigation District, Town of Prescott, Union Pacific Railroad Co., and the United States Bureau of Reclamation. However, the plaintiffs voluntarily dismissed these defendants before the trial court ruled on the motions to dismiss.

of the motions on the additional grounds. Because the trial court considered and ruled on each additional ground raised by the defendants, any of which would be dispositive of this case and support the court's judgment below, we consider them all. *See Bowman v. Bd. of Regents, 162 Ariz. 551, 558-59, 785 P.2d 71, 78-79 (App. 1989)* (no cross-appeal necessary unless issues raised would attack lower court's judgment). We have jurisdiction pursuant to *A.R.S. § 12-2101.*

Discussion

II. The Enabling Act

A. History and Purpose

P5 As a condition of its admission to the United States, Arizona was required to accept and adopt the terms of the New Mexico-Arizona Enabling Act. *Kadish v. Ariz. State Land Dep't, 155 Ariz. 484, 486-87, 747 P.2d 1183, 1185-86 (1987)* (hereinafter "*Asarco I*"). Under the Enabling Act, the United States granted to Arizona, in trust, four sections of land from each township--approximately ten million acres--to be used exclusively for the support of schools and other public institutions. Enabling Act §§ 24, 25, 28; *Forest Guardians v. Wells, 201 Ariz. 255, P 2, 34 P.3d 364, 365 (2001)*; *Asarco I, 155 Ariz. at 486, 747 P.2d at 1185.* The Act placed significant restrictions on the disposition of trust lands, representing a "complete and absolute departure from the enabling acts under which other states were admitted." *Murphy v. State, 65 Ariz. 338, 350, 181 P.2d 336, 344 (1947).*

P6 Before the adoption of the New Mexico-Arizona Enabling Act, twenty-three states had entered the Union through various acts of admission.

Id. Like Arizona, these states had been granted land for specifically delineated purposes, but unlike Arizona, the state legislatures were not restricted in how they could dispose of the land or collect and maintain the trust assets for the benefit of the trust beneficiaries. *Id.* This discretion resulted in "dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, [and] left a scandal in virtually every state." *Id.* In fact, the lands were so "poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona." *Id.*

P7 To ensure that the purposes of the trust would be protected in Arizona, Congress included § 28 in the Enabling Act "to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands." *Lassen v. Arizona ex rel. Ariz. Highway Dep't, 385 U.S. 458, 464, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967)* (hereinafter "*Lassen II*"). Section 28 prohibits the disposition of any trust land except to "the highest and best bidder at public auction" and requires an appraisal of the value of the land before there can be a disposition of the land for its "true value." *Id. at 462.* It also precludes any disposition for consideration less than the value of the property. *Id.* As a consequence for failing to abide by its provisions, the Enabling Act provides that any disposition not made in "substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the . . . State to the contrary notwithstanding." Enabling Act § 28.

P8 Thus, Congress clearly "intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust." *Asarco I, 155 Ariz. at 487, 747 P.2d at 1186.* Because the Enabling Act is federal law, it is the supreme law in Arizona, and therefore we must "strictly apply the Enabling Act's restrictions regarding disposal of school trust assets." *Id. at 486, 488, 747 P.2d at 1185, 1187; see also U.S. Const. art. VI, cl. 2.* However, the practical restrictions contained in the Enabling Act, particularly with regard to compensation for trust lands used by the state for a public purpose, have been a source of continuing and vigorous dispute, as the cases interpreting it illustrate.

B. Cases Interpreting the Enabling Act

P9 In 1937, the State Land Department began granting governmental entities easements across state trust lands for highway construction without compensating the trust for the monetary value of the easements. *Grossetta v. Choate, 51 Ariz. 248, 250, 75 P.2d 1031, 1031-32 (1938).* The first challenge to this practice occurred in *Grossetta.* There the plaintiff had argued that an easement granted across state trust lands for a county highway violated the Enabling Act because the Act did not authorize such easements. *Id. at 251, 75 P.2d at 1032.* Our supreme court rejected this contention, noting that for Congress to have granted so much public land as part of the trust but to then forbid the state from granting easements over it for public highways "would seem not only contrary to the wise policy of Congress, but likely also to defeat in part the very objects of the grant." *Id. at 252-53, 75 P.2d at 1032-33.* The court

therefore held that, because nothing in the Enabling Act precluded the state from granting such easements, they were permissible. *Id. at 254, 75 P.2d at 1033.*

P10 A few years after *Grossetta,* the State Land Commissioner ordered the state to surrender all highway easements it had been granted so that they could be reissued as leases with fixed rental payments for the land and royalty payments for materials. *Conway v. State Land Dep't, 62 Ariz. 248, 249-50, 156 P.2d 901, 902 (1945).* The state challenged the order, and the supreme court, finding *Grossetta* controlling, agreed with the state. *Conway, 62 Ariz. at 253, 156 P.2d at 903.* The court concluded that, although *Grossetta* had not explicitly answered the question of compensation, it was "evident . . . that th[e] court . . . had in mind the undoubted right of the state to provide for public highways, and if such highway was for a wholly public purpose, the right of the state to use such school or institutional lands for highway rights-of-way without compensation [was] inferred." *Conway, 62 Ariz. at 254, 156 P.2d at 904.* The court held that, therefore, the state was not required to compensate the trust when it granted trust lands for public highways. *Id. at 255-56, 156 P.2d at 904.*

P11 Finally, in 1964, the State Land Commissioner adopted a new rule permitting the State Land Department to grant easements for highways and material sites indefinitely "so long as [they are] used for the purpose granted after full payment of the appraised value . . . has been made to the State Land Department." *State ex rel. Ariz. Highway Dep't v. Lassen, 99 Ariz. 161, 162, 407 P.2d 747, 747 (1965)* (internal citation omitted) (hereinafter "*Lassen I*").

The State Highway Department responded by filing a writ of prohibition to prevent enforcement of the new rule. *Id.* The State Land Commissioner argued in *Lassen I* that it was a breach of trust to allow the state to use trust lands without compensating the trust. *Id. at 164, 407 P.2d at 749.* But, our supreme court disagreed.

P12 Relying on its previous decisions in *Grossetta* and *Conway,* the court concluded that the State Land Commissioner could not seek compensation for highway easements and material sites on trust lands. And, it confirmed two "fundamental determinations" it had made in *Conway.*

1. It was held that as a matter of law the grant of nonrental rights of way for the purpose of constructing the kind of roads involved in that case resulted in an over-all benefit to school trust lands.

2. It was held that where there is such a benefit the State Land Department must grant the requested rights of way free of charge.

99 Ariz. at 166, 407 P.2d at 750. The court also distinguished the taking of school trust lands from the taking of private land, where compensation was required. *Lassen I, 99 Ariz. at 166-67, 407 P.2d at 750-51.* The court reasoned that private lands are smaller tracts and the value of the land used for the easement will be out of proportion to the easement's benefit to the land owner, but, under *Conway* and *Grossetta,* the benefit to the trust is determined by an "overall benefit to the trust lands as a whole." *Id.* Therefore, the court concluded, because "it is well known that good highways throughout a state increase the value of the lands," and the easements

grant the state less than a fee estate in the land, "the trust and its beneficiaries are not deprived of anything of value." *Id. at 166, 407 P.2d at 750.* Thus, the court held, the Enabling Act imposed a duty on the State Land Commissioner to grant these easements without obtaining compensation. *Id. at 168, 407 P.2d at 752.*

P13 The State Land Commissioner appealed to the United States Supreme Court, which granted review and reversed the long-standing rule in Arizona that compensation for easements for public highways was not required. *Lassen II, 385 U.S. at 469.* The Supreme Court noted the Enabling Act was ambiguous and did not address the "conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant." *Id. at 461.* It then narrowly defined the issue as "what standard of compensation Arizona must employ to recompense the trust for the land it uses." [3] *Id.*

P14 In *Lassen II,* the Highway Department argued that, under the rules promulgated by the State Land Department, no actual compensation was required because enhanced value could be presumed. *Id. at 465.* The United States, as amicus curiae, advocated a similar position, except that it suggested enhanced value could be prospectively calculated, rather than presumed, and used to offset the amount that would be owed to the trust. *Id.* The Supreme

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[3] The Court also considered whether the state was required to offer public notice and sale when seeking trust land for the state highway program, but this issue is not relevant for our discussion here. *Lassen II, 385 U.S. at 461-62.*

Court rejected both positions, concluding that "the terms and purposes of the [Enabling Act] do not permit Arizona to diminish the actual compensation, meaning thereby monetary compensation, payable to the trust by the amount of any enhancement in the value of the remaining trust lands." *Id. at 466.*

P15 In reaching this conclusion, the Court examined the requirements of the Enabling Act in some detail. It noted that the Act "unequivocally demands" that the trust receive the full value of transferred lands and that the compensation be used exclusively for the purposes of the land trust. *Id. at 466-67.* The Court reviewed the legislative history of the Act to elucidate the purpose of these restrictions, focusing on the increased rigidity of these types of legislation as more states were admitted to the Union. *Id. at 467-68.* Ultimately, the Court found that both the presumption and the particularized showing of enhanced value were insufficient to satisfy the requirements of the Enabling Act, because "the purposes of Congress require that the Act's designated beneficiaries 'derive the full benefit' of the grant[,]" and neither method could "adequately assure fulfillment of that purpose, particularly in the context of lands that are as variegated and far-flung as those comprised in this grant." *Id. at 468* (internal quotation omitted). Therefore, the Court held the state "must actually compensate the trust in money" for easements obtained over state trust lands. *Id. at 469.*

P16 However, in a footnote to its opinion, the Court noted:

> We are informed by counsel that over a period of years Arizona has obtained

> the use of large areas of trust lands on bases that may not have accorded with those set forth in this opinion. We wish to make it plain that we do not reach either the validity of such transfers or the obligations of the State, if any, with respect thereto.

Id. at 470 n.22. Thus, the Court intentionally left for another day the issues of whether the state was required to seek compensation for the easements made prior to its decision in *Lassen II* and whether such easements were necessarily void for having been granted without compensation. The Court remanded the case for further proceedings not inconsistent with its opinion. On remand, our supreme court vacated its writ of prohibition but did not address the issues the Supreme Court had not addressed. *State ex rel. Ariz. Highway Dep't v. Lassen, 102 Ariz. 318, 428 P.2d 996 (1967).* In the wake of *Lassen II,* the State Land Commissioner began collecting compensation for the new easements it granted. But the issue of whether compensation is required for the approximately 900 easements granted prior to the decision has remained unanswered. That issue, and the validity of those 900 easements, are now squarely before us.

III. Standard of Review

P17 Motions to dismiss are generally disfavored because they require an analysis of the legal sufficiency of the complaint without the benefit of a developed factual record. *Forum Dev., L.C. v. Ariz. Dep't of Revenue, 192 Ariz. 90, 93, 961 P.2d 1038, 1041 (App. 1997).* As noted above, on appeal from a motion to dismiss, we assume the facts alleged in the complaint are true and will affirm the dismissal

"only when it appears certain that the plaintiff would not be entitled to relief under any theory given the facts and claims alleged." *Id. P 20*; *Newman v. Maricopa County, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991)*. To this end, we review the trial court's dismissal of a complaint for an abuse of discretion, but we review de novo any questions of law. *Forum Dev., 192 Ariz. at 93, 961 P.2d at 1041.*

IV. Standing

P18 As a threshold matter, we address the defendants' argument that the trial court erred in denying their motion to dismiss on the ground that the school district plaintiffs lacked standing to bring this lawsuit. *See Sears v. Hull, 192 Ariz. 65, P 9, 961 P.2d 1013, 1016 (1998).* The trial court concluded that the codification of Proposition 300, which created the classroom site fund directing certain trust funds directly to schools, "has created a direct legal right in plaintiffs to receive income from state trust lands," and the plaintiffs' "right to said income is different than the rights of the public-at-large." *See A.R.S. § 15-977* (creation of classroom site fund). The court therefore found the plaintiffs had standing to bring their claims.

P19 On appeal, the State Defendants, the City of Peoria (Peoria) and the City of Scottsdale (Scottsdale) argue the trial court erred when it concluded that Proposition 300 had conferred standing on the plaintiffs for violations occurring prior to its enactment. Additionally, they assert the Enabling Act created a charitable trust, which the plaintiffs do not have standing to enforce, because they are "putative beneficiaries" who do not have a special interest in the trust. *See Robert Schalkenbach Found. v.*

Lincoln Found., Inc., 208 Ariz. 176, PP 22-23, 91 P.3d 1019, 1024 (App. 2004). Finally, the defendants generally assert that the plaintiffs lack standing because they have failed to identify a particularized injury that differentiates the harm they have suffered from that of the general public. The plaintiffs counter that § 28 of the Enabling Act, which expressly confers standing, and Arizona case law that interprets the Act and implicitly recognizes the standing of individual taxpayers and public interest groups to bring lawsuits under the Act, provide the basis for their standing in this case.

P20 Whether a party has standing to sue is a question of law this court reviews de novo. *Id. P 15.* Because Arizona has no counterpart to the federal "case or controversy" requirement, "'the question of standing . . . is not a constitutional mandate.'" *Fernandez v. Takata Seat Belts, Inc., 210 Ariz. 138, P 6, 108 P.3d 917, 919 (2005), quoting Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz., 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985).* Instead, Arizona courts are governed primarily by "questions of prudential or judicial restraint," which "insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries." *Armory Park, 148 Ariz. at 6, 712 P.3d at 919.* Nevertheless, Arizona maintains a "rigorous standing requirement." *Fernandez, 210 Ariz. 138, P 6, 108 P.3d at 919.* Therefore, the "plaintiff must allege a distinct and palpable injury," and "[a]n allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient." *Sears v. Hull, 192 Ariz. 65, P 16, 961 P.2d 1013, 1017 (1998).*

P21 Section 28 of the Enabling Act specifically charges the United States Attorney General with the duty of enforcing the state land trust, but the Act also expressly provides that "[n]othing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act." The precise right conferred by this language has generally not been discussed in case law interpreting the New Mexico-Arizona Enabling Act. *See, e.g., Forest Guardians v. Powell, 2001 NMCA 28, 130 N.M. 368, 24 P.3d 803, 808-09 (N.M. App. 2001)* (acknowledging language of § 10 of Enabling Act, New Mexico's equivalent to § 28, but not addressing scope or meaning). However, in Arizona it is abundantly clear that our courts have interpreted § 28 to permit members of the public to sue for violations of the Enabling Act.

P22 First, in *Grossetta v. Choate, 51 Ariz. 248, 249, 75 P.2d 1031, 1031 (1938)*, our supreme court permitted an individual to contest the Pima County Board of Supervisors' planned right-of-way through a parcel of land. It is unclear from the opinion what connection, if any, the individual had to the parcel of land at issue, but it is clear that on appeal he abandoned whatever personal claims he had made below and was permitted to argue generally that the proposed right-of-way violated the dispositional requirements of the Enabling Act and was therefore void. *Id.*

P23 Then, in *Asarco I*, our supreme court permitted the plaintiffs, whom it described as "taxpayers who allege that their taxes support public education in Arizona," and the Arizona Education Association to maintain a lawsuit alleging that a statute governing mineral leases on state lands was void because it

failed to comply with the Enabling Act. *155 Ariz. at 485, 747 P.2d at 1184.* The plaintiffs did not assert they had sustained personal harm, claiming only that the regulations did not appropriately compensate the trust for the value of minerals extracted. *Id. at 486, 747 P.2d at 1185.* When the court found the regulations violated the Enabling Act, the defendants appealed to the United States Supreme Court, where they argued the lawsuit should be dismissed because the plaintiffs lacked standing to bring it. *Asarco Inc. v. Kadish, 490 U.S. 605, 612, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)* (hereinafter "*Asarco II*"). In analyzing this question, the Court noted that the plaintiffs "d[id] not allege any special circumstances or exceptions that would confer standing upon them. Instead, they have simply asserted that [an] Arizona statute governing mineral leases has 'deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes.'" *Id. at 613.* It continued, "The claims raised here, moreover, are the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts." *Id. at 616.*

P24 Nevertheless, the Court recognized that "the constraints of Article III [of the United States Constitution] do not apply to state courts," and "[a]lthough the state courts are not bound to adhere to federal standing requirements, they possess the authority . . . to render binding judicial decisions that rest on their own interpretations of federal law." *Id. at 617.* The Court therefore concluded the Arizona courts' determinations that the taxpayer-plaintiffs had standing was binding and did not undermine the jurisdictional basis for the courts' decisions below. *Id. at 617-18.*

P25 Later, in *Jeffries v. Hassell, 197 Ariz. 151, P 1, 3 P.3d 1071, 1072 (App. 1999)*, Division One of this court permitted, without comment, "Arizona taxpayers with children in Arizona public schools" to bring a lawsuit alleging the State Land Department's policies regarding grazing leases on state trust lands violated the Enabling Act. Again, the plaintiffs did not allege they had sustained personal injury other than the fact the state had failed to maximize trust revenue. *Id.*

P26 In each of these cases, the plaintiffs had suffered no harm beyond that suffered by the general public, yet our courts permitted the lawsuits to proceed. We acknowledge that in none of the cases did the courts actually address the issue of standing, but it is apparent that *Asarco II* did not in subsequent cases alter our courts' permissive approach to standing to enforce the Enabling Act. To the contrary, in these cases the courts prominently and explicitly acknowledged that the lawsuits were being brought by citizens and public interest groups who had not alleged a personal injury.

P27 In light of this Arizona case law, we are not persuaded by the New Mexico authority on which the defendants rely. The federal land grant at issue in *Board of Education v. School District No. 5, 21 N.M. 624, 157 P. 668 (N.M. 1916)*, does not appear to have contained a provision permitting citizens of the state to enforce the grant as the Enabling Act does. Therefore, its analysis and conclusion that the plaintiff school districts lacked standing is inapplicable. And, in *Forest Guardians v. Powell, 24 P.3d at 814*, a case involving the Enabling Act, the New Mexico Supreme Court concluded that individual taxpayers and nonprofit associations did not have standing to

sue. However, the standing of school districts was not an issue in that case, and the court, in fact, explicitly noted that school districts would perhaps have a stronger claim of standing than general taxpayers. *Id.*

P28 Finally, we note the plaintiffs are school districts whose interests in the state land trust are far more defined than the taxpayers and parents of children attending public schools, whose standing in *Asarco I* and *Jeffries* went unchallenged. Section 24 of the Enabling Act specifically granted the state certain lands in trust to be used for the "support of the common schools." Therefore, unlike those plaintiffs, school districts, as the modern incarnation of the common schools, are part of a named, albeit broad, class of trust beneficiaries. *See Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 629 (10th Cir. 1998)* ("Today's public school districts are the direct political descendants of those 19th Century 'common schools.'").

P29 Contrary to the defendants' arguments, the fact that the legislature may have discretion in administering trust funds to the school districts in a particular year does not render them "putative beneficiaries" or alter this analysis. *See Restatement (Second) of Trusts § 214 cmt. a* (if trustee has discretion to select one or more members of definite class as beneficiaries, any member of class can sue trustee prior to selection), *§ 391* (persons with special interest in charitable trust may sue for its enforcement). [4]

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[4] Although we do not decide whether the land trust constitutes a charitable trust, we note the same principles apply in that context as well. *See Schalkenbach, 208 Ariz. 176, P 23, 91*

(continued on following page)

Cf. Price v. Akaka, 928 F.2d 824, 827, 827 n.2 (9th Cir. 1990) (individual native Hawaiian had standing to enforce Hawaii Admission Act even though receipt of benefit under trust subject to discretion and redress of alleged wrong would not necessarily benefit native Hawaiian plaintiff). Similarly, the defendants' contention that the plaintiffs are mere conduits of money is also unavailing given the Enabling Act's explicit identification of "common schools" and not the general public as the beneficiaries for whose support state trust lands are to be maintained. *See* Enabling Act § 24.

P30 Furthermore, to the extent Scottsdale argues the plaintiffs lack standing because they did not first attempt to have the United States Attorney General bring their claim, they provide no authority to suggest this procedural step is a prerequisite to suing. *See Ariz. R. Civ. App. P. 13(a)(6), (b)* (appellate briefs "shall contain . . . citations to the authorities . . . relied on"). The Enabling Act contains no such requirement, and in none of the Enabling Act case law cited by the parties has a court determined a plaintiff lacked standing for failure to first alert the Attorney General to their claim.

P31 Therefore, we find nothing in our case law to support the defendants' argument and agree with the two members of our supreme court who concluded that the Enabling Act contemplates that "citizens of the state may act for the benefit of the state as a whole in enforcing the dispositional restrictions of § 28." *Asarco I, 155 Ariz. at 498, 747*

P.3d at 1024 (current beneficiary has special interest sufficient to enforce charitable trust).

P.2d at 1197 (2-2 divided court). Because we conclude our prior case law and the Enabling Act confer standing on the school districts, we need not determine whether Proposition 300 also confers standing on these plaintiffs or whether the state land trust is a charitable trust. *See Forszt v. Rodriguez, 212 Ariz. 263, P 9, 130 P.3d 538, 540 (App. 2006)* (appellate court may affirm trial court if correct for any reason).

V. Failure to State Claims for Relief

P32 We next address the defendants' argument that the trial court erred in denying the motion to dismiss because the plaintiffs failed to state valid claims for relief. In the proceedings below, the defendants argued the plaintiffs had failed to state claims upon which relief could be granted because the relief sought was impossible or impractical. The trial court rejected this argument. We review de novo the trial court's ruling on a motion to dismiss for failure to state a claim. *Phelps Dodge Corp. v. El Paso Corp., 213 Ariz. 400, P 8, 142 P.3d 708, 710 (App. 2006).*

P33 On appeal, the Arizona Department of Transportation (ADOT) argues the plaintiffs have failed to state claims upon which relief can be granted because they will derive no benefit from the lawsuit even if they ultimately prevail. First, ADOT argues the law does not recognize a claim for compensation under void easements; therefore, the plaintiffs could not be entitled to any relief because if the easements are, in fact, void, then it and the other occupiers of the land would be licensees and invitees who would be entitled to compensation for any improvements they have made upon the land. However, neither ADOT nor any other defendant as-

serted this argument below. We therefore decline to consider it on appeal. *See Ness v. W. Sec. Life Ins. Co., 174 Ariz. 497, 501, 851 P.2d 122, 126 (App. 1992).* [5]

P34 Second, ADOT argues that the plaintiffs failed to state a claim for declaratory relief because they will not receive a "discrete, tangible benefit" even if they are successful. They contend that because a "declaration voiding the '09 easements would not result in any monetary benefit to the plaintiffs" and would result in the easements reverting back to the State Land Department, "[t]here is no imaginable way in which this would benefit the plaintiffs."

P35 Whether a plaintiff has stated a valid claim for declaratory relief is a question of law we review de novo. *See Gamez v. Brush Wellman, Inc., 201 Ariz. 266, P 4, 34 P.3d 375, 378 (App. 2001).* "In order for there to be a justiciable controversy for the purposes of [a] declaratory judgment . . . there must be an assertion of a right, status or legal relation in which the plaintiff has a definite interest and a denial of [the right] by the opposing party." *Samaritan Health Svcs. v. City of Glendale, 148 Ariz. 394, 395, 714 P.2d 887, 888 (App. 1986); see also Hunt v. Richardson, 216 Ariz. 114, P 37, 163 P.3d 1064, 1075 (App. 2007).*

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[5] Additionally, we note the plaintiffs' claim for monetary relief is not specious, as ADOT contends. If it is determined that the conveyances are not void, but compensation was nonetheless required for the 09 easements and was never obtained, the defendants could be ordered to compensate the trust. This remedy would bring additional funds to the trust which the trustee has thus far not sought to obtain. Because the plaintiffs are beneficiaries of the trust, this results in a benefit to them as well.

The plaintiffs have asserted that the State Land Commissioner and State Land Department have permitted ADOT and the other county-municipal defendants to occupy and use school trust lands without compensation for the use of the land, in violation of the Enabling Act and *Lassen II*. We have already determined that the plaintiffs are current beneficiaries of the school land trust; therefore, they unquestionably have a justiciable interest in whether the trust has been deprived of funds to which it was entitled. *See In re Hayes, 129 Ariz. 174, 176, 629 P.2d 1010 (App. 1981), quoting Restatement (Second) of Trusts § 200* (only beneficiary may sue for breach of trust). Therefore, the trial court did not err in concluding the plaintiffs had stated a claim for declaratory relief.

P36 Separately, the State Defendants argue the plaintiffs have not asserted a valid claim that they are entitled to an accounting of the trust property. The plaintiffs contend they are entitled to an accounting based on private trust principles that have generally been applied in state land trust cases. *See Asarco I, 155 Ariz. 484, 487, 747 P.2d at 1186*; *Jeffries, 197 Ariz. 151, P 6, 3 P.3d at 1074*; *Skamania County v. State, 102 Wn.2d 127, 685 P.2d 576, 580 (Wash. 1984)*; *State v. Univ. of Alaska, 624 P.2d 807, 813 (Alaska 1981)*. However, contrary to the plaintiffs' assertion, these cases do not state that every duty owed by private trustees to their beneficiaries applies between the state and land trust beneficiaries.

P37 The right of a beneficiary of a private trust to demand an accounting is conferred by statute. *A.R.S. § 14-7303*. The purpose of this right is to enable the beneficiary to examine the trustee's administration

of the trust and ensure that the trustee is complying with the obligations under the trust. *See Estate of P.K.L. v. J.K.S., 189 Ariz. 487, 492-93, 943 P.2d 847, 852-53 (App. 1997).* There is no comparable statute providing that beneficiaries of the state land trust are entitled to accountings of the land trust on demand; nor does the Enabling Act contain such a right. However, the state land trust is not without other protections equivalent to those afforded by a formal accounting under a private trust.

P38 As a state agency, the State Land Department is subject to substantial oversight by both the public and the legislative and executive branches of government. State agencies are required to maintain records that are open to all members of the public, including the plaintiffs. *A.R.S. §§ 39-121, 39-121.01.* Additionally, the Joint Legislative Audit Committee and State Auditor General both critically review the activities of state agencies, including the State Land Department. *A.R.S. §§ 41-1279, 41-1279.01*; *Asarco I, 177 Ariz. at 330, 868 P.2d at 343* (citing auditor report as evidence of losses to state land trust due to provisions of state mining leases).

P39 We acknowledge the plaintiffs' argument that despite this level of oversight, in the past, problems with the trust administration have not been ameliorated until a third party has brought a cause of action on behalf of the trust beneficiaries. *See, e.g., Asarco I, 177 Ariz. at 330, 868 P.2d at 343.* However, such problems are not unique to the state land trust and we fail to see how requiring the State Land Department to render a formal accounting upon request will prevent this problem from occurring in the future. As *Asarco I* demonstrates, the information available in the public records is more

than sufficient to inform the public about the status of the trust and its administration. Furthermore, it appears from the record that the plaintiffs have actually received all the information that would have been contained in an accounting. They were given the opportunity to review all the public records pertaining to the 09 easements, and the State Land Department provided them with a report on the easements in September 2003. The plaintiffs have not asserted that this information was not sufficient or otherwise incorrect. We therefore conclude that beneficiaries of the state land trust are not entitled to a formal accounting of the type requested by plaintiffs, and the trial court erred in failing to dismiss this claim on these grounds.

VI. Notice of Claim Statute

P40 The State Defendants next argue the trial court erred in finding that *§ 12-821.01*, the notice of claim statute, did not apply to this case. They assert, as they did below, that although the plaintiffs do not seek money damages, the notice of claim statute should still be applied to them because of the cost to the state of litigating the validity of the 09 easements.

P41 Preliminarily, the plaintiffs contend *§ 12-821.01* does not apply to their claims because they are based on express provisions of the Enabling Act, a federal statute the provisions of which cannot be overridden by state law. They rely on *Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988)*, and *Mulleneaux v. State, 190 Ariz. 535, 950 P.2d 1156 (App. 1997)*, as authority for this proposition. However, their reliance on *Felder* and

Mulleneaux is misplaced. Unlike those cases, which concerned causes of action under *42 U.S.C. § 1983*, no statutorily created federal cause of action is at issue in this case. *See Jones v. Brush, 143 F.2d 733, 735 (9th Cir. 1944)* (Enabling Act did not create federal cause of action). The analysis in *Felder* is thus inapposite.

P42 Nonetheless, on state law grounds, we find *§ 12-821.01 (A)* inapplicable to the plaintiffs' claims, with the exception of their alternative request for monetary relief in their claim for breach of fiduciary duty. *Section 12-821.01 (A)* provides that "[p]ersons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service . . . within one hundred eighty days after the cause of action accrues." Failure to timely file a notice of claim requires dismissal of the case. *Martineau v. Maricopa County, 207 Ariz. 332, P 15, 86 P.3d 912, 915 (App. 2004)*; *see also Blauvelt v. County of Maricopa, 160 Ariz. 77, 80, 770 P.2d 381, 384 (App. 1988)*. However, this court has found the statute inapplicable to claims for injunctive and declaratory relief. *See State v. Mabery Ranch, Co., 216 Ariz. 233, P 48, 165 P.3d 211, 223 (App. 2007)* (injunctive relief); *Martineau, 207 Ariz. 332, P 24, 86 P.3d at 917* (declaratory relief).

P43 In *Martineau*, Division One of this court noted that the purposes of the notice of claim statute were "to allow the public entity to investigate and assess liability, to permit the possibility of settlement prior to litigation, and to assist the public entity in financial planning and budgeting." *207 Ariz. 332, P 19, 86 P.3d at 915-16*. The court then concluded the statutory language was inconsistent with the declaratory relief sought because, if success-

ful, it would not directly affect the public entity's financial planning or budgeting, and there was no reasonable monetary estimate for settling the claim. *Id. PP 19-21.* Drawing from this analysis, in *Mabery Ranch,* the court concluded that the plain language of *§ 12-821.01(A)* demonstrates that it was intended to only apply "to claims for money damages," and was not intended "to apply to claims that seek only to restrain government conduct." *216 Ariz. 233, P 52, 165 P.3d 211, 223.*

P44 We note that the plaintiffs originally filed their lawsuit solely against the State Defendants without having first filed a notice of claim. But, the relief they originally sought was generally equitable in nature and did not include a request for money damages. The defendants nevertheless assert that if the plaintiffs are successful, the cost of litigating the easements affects them financially. However, this is not the type of financial impact contemplated by the statute. The purpose of the notice of claim statute is to minimize governmental liability by informing the government of the nature and magnitude of a claim for monetary damages, thereby allowing it to make an informed choice about whether to settle or pursue the litigation. *Martineau, 207 Ariz. 332, P 19, 86 P.3d at 915-16.* As the court noted in *Martineau,* the statute is concerned with direct effects upon financial planning and budgeting when a public entity is confronted with liability for monetary damages. *Id. P 20.* Therefore, we conclude the notice of claim statute does not apply to the plaintiffs' claims for equitable relief.

P45 However, in their claim for breach of fiduciary duty, the plaintiffs alternatively ask the court to compel the state to compensate the trust for the

value of the 09 easements it had granted in contravention of the Enabling Act. This is a direct claim for monetary relief and does not qualify as incidental damages, which are permitted without requiring compliance with the notice of claim statute. *See Martineau, 207 Ariz. 335, P 15, 86 P.3d at 915*; *Blauvelt, 160 Ariz. at 80, 770 P.2d at 384.*

P46 Finally, we note the county-municipal defendants were joined as indispensable parties over the plaintiffs' objections, and the plaintiffs were never required to amend their complaint to state claims against these defendants. Therefore, the trial court did not err in finding the notice of claim statute did not apply to the plaintiffs' lawsuit, with the exception of their claim for money damages against the State Defendants. That claim should have been dismissed for failure to file a notice of claim pursuant to *§ 12-821.01.*

VII. Statute of Limitations

P47 Next, the defendants contend the trial court erred in failing to dismiss the complaint on statute of limitations grounds. A dismissal based on the statute of limitations is only appropriate when "'it appears from the face of the complaint that the claim is barred.'" *McCloud v. State, 217 Ariz. 82, P 8, 170 P.3d 691, 694 (App. 2007), quoting Anson v. Am. Motors Corp., 155 Ariz. 420, 421, 747 P.2d 581, 581 (App. 1987).* In response to the State Defendants' initial motion to dismiss, filed before the county-municipal defendants had been joined, the court concluded the plaintiffs "were not aware of [the State Land Department]'s final decision about seeking payment for the 09 Easements until June, 2004," and

the lawsuit was therefore timely under the statute of limitations.

P48 Generally, a threshold issue in determining whether the statute of limitations bars a claim is the date on which the claim accrued. *See Flood Control Dist. v. Gaines, 202 Ariz. 248, P 17, 43 P.3d 196, 202 (App. 2002).* The parties do not dispute that *A.R.S. § 12-821* applies to this case. It provides that "[a]ll actions against any public entity or public employee shall be brought within one year after the cause of action accrues." *§ 12-821.* For purposes of this statute, a cause of action accrues when "the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." *A.R.S. § 12-821.01(B); see Dube v. Likins, 216 Ariz. 406, P7, 167 P.3d 93, 98 (App. 2007); Long v. City of Glendale, 208 Ariz. 319, P 9, 93 P.3d 519, 525 (App. 2004).* Although the state land trust is not a private trust, "private trust law principles . . . apply to federal land granted to the states for school purposes." *State v. Univ. of Alaska, 624 P.2d 807, 813 (Alaska 1981)* (noting *Lassen II* established applicability of private trust law to state land trusts); *see also Asarco I, 155 Ariz. at 487-88, 747 P.2d at 1186-87; Jeffries, 197 Ariz. 151, P 6, 3 P.3d at 1074; Skamania County v. State, 102 Wn.2d 127, 685 P.2d 576, 580 (Wash. 1984).* Thus, applying these general principles, the plaintiffs' claims accrued when they realized or reasonably should have realized that the State Land Commissioner had failed to obtain compensation for the 09 easements. *Harris Trust Bank of Ariz. v. Superior Court, 188 Ariz. 159, 163, 933 P.2d 1227, 1231 (App. 1996); see also § 12-821.01.*

P49 On appeal, the State Defendants argue the trial court erred in finding the plaintiffs' lawsuit was filed within the limitations period, and they propose three alternative dates on which the plaintiffs' claims accrued: (1) the individual dates on which each 09 easement was first granted; (2) the date of the Supreme Court's decision in *Lassen II;* and (3) the date on which the plaintiffs first contacted the State Land Commissioner about the status of the 09 easements, which was in June 2003.[6] We address each of the State's alternative accrual dates in turn below.

A. Date of original grants

P50 The State Defendants first argue the plaintiffs' cause of action accrued on the dates each easement was originally granted. The 09 easements were apparently granted between 1929 and 1967. However, because two Arizona cases prior to *Lassen* had held that compensation was not required when easements were granted to other state agencies for highway purposes, and the State Land Department and State Land Commissioner had taken a similar position, the plaintiffs did not know, nor should they have known, that the trustee was in breach of the

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[6] We note the school districts argue the trial court erred in applying the statute of limitations and the doctrine of laches in this case because the State Defendants' continual failure to obtain compensation for these easements while allowing the county-municipal defendants to occupy and use trust lands is a continuing violation of the Enabling Act and the doctrine of laches cannot apply where the state's sovereign title to land is implicated. However, because we find that neither the statute of limitations nor laches bars the plaintiffs' claims, we do not address the school districts' continuing violation argument.

trust by failing to obtain compensation for the easements. *See Conway, 62 Ariz. at 248, 156 P.2d at 901*; *Grossetta, 51 Ariz. at 248, 75 P.2d at 1031.*

B. *Lassen II* decision

P51 Next, the State Defendants contend the plaintiffs' claims accrued when *Lassen II* was decided because it put the plaintiffs on notice that the State Land Commissioner was required to obtain compensation for these easements. They argue that, whether or not the plaintiffs ever actually read the *Lassen II* decision before 2003, knowledge of its holding should be imputed to them because the public is presumed to know the law. To support this contention, defendants cite *Allen v. Yukins, 366 F.3d 396 (6th Cir. 2004)*, and *State v. Simms, 201 Conn. 395, 518 A.2d 35 (Conn. 1986)*, both criminal cases in which the defendants were charged with constructive knowledge of court decisions.[7] *See also State v. Morse, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980)* (ignorance of the law forbidding charged conduct is no defense).

P52 Even assuming the publication of *Lassen II* placed the plaintiffs on constructive notice of its contents, that does not necessarily mean they had

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[7] Defendants also cite *International Business Machines Corp. v. United States, 38 Fed. Cl. 661 (1997)*, which quotes a treasury regulation stating that interpretations of foreign law are not reasonable if the taxpayer has constructive notice, including published court decisions, that his interpretation is likely to be erroneous. *38 Fed. Cl. at 668.* However, the case does not apply the constructive notice part of the statute. *Id. at 669*, In any event, the fact that constructive notice was statutorily imposed in that case is irrelevant here, where there is no like statute explicitly imposing constructive notice of other law.

notice that the State Land Commissioner had failed to obtain compensation for the 09 easements. The parties do not dispute that *Lassen II* provided notice of its direct holding that the presumed enhancement in the value of remaining trust land was an insufficient method of compensating the trust for conveyances of trust land for other state purposes, and therefore the state was required to "actually compensate the trust in money." *385 U.S. at 465, 469.* After *Lassen II,* it was clear that the State Land Department was required to obtain compensation for easements granted over state trust lands going forward. But, the opinion did not expressly address the issue presented in this case: whether the State Land Commissioner was required to obtain compensation for easements granted before the Court decided *Lassen II* and then failed to do so after it was decided.

P53 As we noted above, the Court's only reference to this issue can be found in footnote 22 of the opinion, which reads:

> We are informed by counsel that over a period of years Arizona has obtained the use of large areas of trust lands on bases that may not have accorded with those set forth in this opinion. We wish to make it plain that we do not reach either the validity of any such transfers or the obligations of the State, if any, with respect thereto.

385 U.S. at 469 n.22. The defendants contend this footnote "provided notice that there were existing easements of the '09' easement variety," ones that had been obtained without compensation, and, "had [the plaintiffs] simply inquired [in 1967], they could

have learned the precise status of all of the '09 easements." Furthermore, they contend, all of the records were public, so the plaintiffs could have obtained them at any time.

P54 First, we agree with the plaintiffs that footnote 22 did little more than expressly note the limited nature of the issues the Court was deciding. It did not "put the plaintiffs, or any other beneficiary of the trust, on notice that the State Land Department did not intend to abide by [the decision]." Contrary to the defendants' suggestion, the footnote does not signify that there were, in fact, uncompensated easements. It states only that such easements "may" exist. In addition, the footnote "plainly" indicates that the Court's opinion does not reach the issues concerning what obligations the state might have with regard to compensation for the 09 easements or the validity of uncompensated conveyances. Although the Court essentially acknowledged the issues, it specifically declined to decide them. We thus fail to see how *Lassen II* put the plaintiffs on notice that the State Land Commissioner had actually failed to collect compensation for the 09 easements prior to the decision.

P55 But, even assuming the plaintiffs were in possession of all the facts necessary to file a claim for general accrual of claim purposes after *Lassen II,* a "distinction exists between the point in time when a justiciable controversy arises which permits the filing of a declaratory relief action, and when an action accrues for purposes of a period of limitations." *W. Cas. & Sur. Co. v. Evans, 130 Ariz. 333, 336, 636 P.2d 111, 114 (App. 1981).* To trigger the statute of limitations for declaratory relief purposes, there must be some affirmative conduct by the

plaintiff or defendant that takes the claim out of "the realm of mere possibility" and creates an "'actual controversy.'" *W. Cas. & Sur. Co., 130 Ariz. at 337, 636 P.2d at 115. See La Canada Hills Ltd. P'ship v. Kite, 217 Ariz. 126, PP 3, 9-10, 171 P.3d 195, 197-99 (App. 2007)* (where declaratory action arose from failure of partner to make payments more than ten years prior to filing of action, statute of limitations accrued upon cessation of partnership dealings, not upon failure to make payments); *Sende Vista Water Co. v. City of Phoenix, 127 Ariz. 42, 47-48, 617 P.2d 1158, 1163-64 (App. 1980)* (despite contingency in contract, claim for declaratory relief did not accrue for statute of limitations purposes until contingency failed to occur and court entered judgment against appellees). *See also Planned Parenthood Ctr. of Tucson v. Marks, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972)* (action for declaratory judgment requires "actual controversy which must be real and not theoretical"); *Land Dep't v. O'Toole, 154 Ariz. 43, 47, 739 P.2d 1360, 1365 (App. 1987)* (justiciable controversy requires assertion of legal interest and "*assertion of the denial of it by . . . other party*").

P56 In *Western Casualty,* Evans had been injured in a car accident, and in a subsequent malpractice action the jury found that her treating surgeon, Dr. Fridena, had committed malpractice in treating her leg. *Id. at 334-35, 636 P.2d at 112-13.* Western Casualty defended Fridena in the lawsuit under a reservation of rights, but three months after the jury rendered a verdict in Evans's favor, it filed an action for a declaratory judgment that it was not liable to Fridena's estate for coverage on the date the malpractice had occurred. *Id.* Evans and Fridena asserted statute of limitations and laches defenses, claiming Western Casualty's claim had accrued at

the time the lawsuit against Fridena was filed because the malpractice had occurred nine years before, and it was aware of the claim against its insured. *Id. at 335, 636 P.2d at 113.* Division One disagreed, noting:

> As a legal representative of the insured, [Fridena's estate] could have brought a declaratory judgment action from the moment a justiciable controversy existed. We find that a justiciable controversy existed between Fridena and [Western Casualty] when [it] notified Fridena it was undertaking her representation under a reservation of right. From that point on, either party could have initiated a declaratory judgment action to clarify the coverage issue, but . . . neither did so. However, the fact that either party could have sought a declaration regarding coverage as of the filing of the reservation of right does not mean that the action accrued at that time for statute of limitation purposes.
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> . . . .
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> "We believe that in cases where, as here, all determinative facts giving rise to the potential policy coverage dispute have occurred prior to the initial demand upon the insurance company, no actual controversy arises among the parties until such time as the issuing company is called upon to either pay or defend a claim on behalf of its insured under the terms of the policy in question. Since an actual controversy is required as a condition precedent to the institution of an action seeking a declaration of rights . . . no such action can accrue until such time. Until the insurance company is called

> upon to defend or pay the claim, the entire matter is within the realm of mere possibility, and parties ought not be placed in the position of failing to act at their peril in such unpredictable circumstances."

Id. at 336-37, 636 P.2d at 114-15, quoting Gibraltar Ins. Co. v. Varkalis, 46 Ill. 2d 481, 263 N.E.2d 823, 826 (Ill. 1970) (internal citations omitted).

P57 We believe the same reasoning applies here. Although *Lassen II* may have notified the plaintiffs of the *potential for* a breach of trust in the period after the Supreme Court's decision, the State Land Commissioner's breach was only within "the realm of mere possibility." It was unclear what impact, if any, *Lassen II* would have on the validity of the 09 easements, and, at the time, there was no indication the Commissioner did not intend to seek compensation for the 09 easements or otherwise address the issue pursuant to the Court's holding. Thus, *Lassen II,* standing alone, did not create an "actual controversy" sufficient to trigger the statute of limitations.

P58 The remainder of the defendants' arguments focus on the plaintiffs' responsibilities to monitor the trustee's actions after *Lassen II* was decided. Essentially, they argue the plaintiffs should be charged with constructive notice of the public records and the State Land Commissioner's actions in the *post-Lassen II* period. However, unlike constructive notice of the law, public records only serve as constructive notice to those who are bound to search them. *See Mountain States Tel. & Tel. Co. v. Kelton, 79 Ariz. 126, 130-31, 285 P.2d 168, 170-71 (1955); Long v. City of Glendale, 208 Ariz. 319, P 14, 93 P.3d 519, 525 (App. 2004).* Similarly, we also do not attribute

notice of government action (or inaction) in the absence of actual knowledge. *See Long, 208 Ariz. 319, P 13, 93 P.3d at 525.*

P59 The defendants have cited no authority for the proposition that the plaintiffs, as beneficiaries of the state land trust, were obligated to search public records or otherwise keep abreast of the State Land Department's actions, nor have we found any. It is the trustee, not the beneficiaries, who has the primary duty to ensure the trust is administered according to its provisions. *See Asarco I, 155 Ariz. 484, 487-88, 747 P.2d 1183, 1186-87 (1987)* (state's duties to administer land trust those of trustee and not merely good business manager). This is true in this case, particularly because it was the State Land Commissioner's own rule the Court had upheld in *Lassen II*. Thus we cannot say the plaintiffs constructively received notice of the State Land Commissioner's potential breach from *Lassen II*, the available public records, or actions taken by the State Land Commissioner during this period in the absence of proof of actual knowledge.

C. June 2003 [8]

P60 Finally, the State Defendants argue, as they did below, that the plaintiffs' claims accrued, at the latest, in June 2003, when they sent a letter to the State Land Commissioner inquiring about the status

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[8] Elsewhere in their brief, the defendants seem to suggest that the cause of action accrued on August 26, 2003, when the State Land Department responded to the plaintiffs' initial inquiry. However, since both dates are more than one year before the lawsuit was filed, this difference is irrelevant.

of the 09 easements.[9] In their motions to dismiss, the defendants argued that the plaintiffs' letter, which had "express[ed their] opinion that the '09 Easements are void and demand[ed] to know what action [the State Land Department] had taken to collect compensation for the grant" was evidence the plaintiffs were aware of their claims more than a year prior to the date the complaint was filed, October 15, 2004. In their response, the plaintiffs did not dispute this characterization of the letter, but they did allege the State Land Commissioner's response to their letter indicated he intended to resolve the issue of these easements and that he would provide plaintiffs with a copy of a status report of the easements once it was finished. After they had received the report, the plaintiffs sent another letter asking for information about the State Land Department's plans to obtain compensation for the easements. Between October 2003 and June 2004, the parties exchanged a series of letters and attended meetings at which the State Land Commissioner continued to state it planned to pursue compensation, and it was not until June that "it became clear" the State Land Commissioner did not intend to pursue compensation.

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[9] The parties attached a series of letters between the plaintiffs and the State Land Commissioner to their filings below. A trial court's consideration of extrinsic evidence on a motion to dismiss generally converts it into a motion for summary judgment. *See Blanchard v. Show Low Planning & Zoning Comm'n, 196 Ariz. 114, P 11, 993 P.2d 1078, 1081 (App. 1999).* However, it is not clear from the minute entry whether the court actually considered these letters, and none of the parties argues the motion to dismiss was converted into a motion for summary judgment. We therefore will continue to treat it as a motion to dismiss. *See Dube v. Likins, 216 Ariz. 406, n.2, 167 P.3d 93, 104 n.2 (App. 2007).*

P61 Although the defendants offered a different interpretation of these letters in their motion to dismiss, this merely raises an issue of fact as to when the plaintiffs "realize[d they] ha[d] been damaged and kn[e]w[] or reasonably should [have] know[n] the cause." *§ 12-821.01(B).* In reviewing a trial court's decision on a motion to dismiss, we are required to assume the facts alleged in the complaint are true. *Forum Dev., L.C. v. Ariz. Dep't of Rev., 192 Ariz. 90, 93, 961 P.2d 1038, 1041 (App. 1997).* Therefore, we cannot say the trial court erred in denying the motion to dismiss because the defendants had failed to demonstrate, on the face of the complaint, that the plaintiffs' claims were barred by the statute of limitations. *See McCloud v. State, 217 Ariz. 82, P 8, 170 P.3d 691, 694 (App. 2007)* (statute of limitations appropriately raised where it appears from face of complaint that claim is barred).

VIII. Laches

P62 In a related argument, the defendants asserted in their motions to dismiss that the plaintiffs' claims were barred by the equitable doctrine of laches. The trial court agreed with the defendants, finding the plaintiffs had unreasonably delayed after the *Lassen II* decision in bringing their claims. The court concluded that the defendants had been prejudiced as a result of the plaintiffs' delay due to the increase in land values in the intervening forty-one years. On appeal, the plaintiffs argue that the trial court erred in finding their claims barred because the defendants failed to establish both undue delay and prejudice.

P63 We review a trial court's determination of whether a claim is barred by the doctrine of laches

for an abuse of discretion. *Korte v. Bayless, 199 Ariz. 173, P 3, 16 P.3d 200, 201 (2001).* "Absent erroneous interpretation of the law or clearly erroneous factual underpinnings, 'the [trial court's] determination can be over turned only if [its] decision represents an unreasonable judgment in weighing relevant factors.'" *McComb v. Superior Court, 189 Ariz. 518, 525, 943 P.2d 878, 885 (App. 1997), quoting AC. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1039 (Fed. Cir. 1992).* "The defense of laches consists of two essential elements: (1) unreasonable delay, and (2) disadvantage or prejudice to the party asserting the defense. An element of this disadvantage is a change of position in good faith as a result of the delay." *Tovrea v. Umphress, 27 Ariz. App. 513, 521, 556 P.2d 814, 822 (1976).* As we concluded above, on the face of the complaint, the plaintiffs' cause of action did not accrue until June 2004. The lawsuit was filed four months later. For purposes of determining whether the claims are barred by laches, the time could not have commenced until June 2004. *See Flynn v. Rogers, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992)* ("delay must come after the party against whom the defense is asserted becomes aware of or has knowledge of . . . his right"); *see also W. Cas. & Sur. Co. v. Evans, 130 Ariz. 333, 337, 636 P.2d 111, 115 (App. 1981)* (doctrine of laches does not apply prior to accrual of claim).

P64 Laches is an affirmative defense; therefore, the burden of establishing it is on the party asserting it. *Flynn, 172 Ariz. at 66, 834 P.2d at 152.* On appeal, the defendants' arguments relate only to the passage of time since *Lassen II,* and they have not separately argued that the delay between June 2003 and October 2004 was unreasonable or that they suffered a disadvantage due to any delay within this period. *See*

Tovrea, 27 Ariz. App. at 521, 556 P.2d at 822. However, they do cite a number of cases that barred claims on the ground of laches filed less than four months after the claim accrued. Three of these cases dealt with election and voting issues, which necessarily involve truncated timetables. *See Sotomayor v. Burns, 199 Ariz. 81, P9, 13 P.3d 1198, 1200 (2000)* (two-month delay barred claims because litigants in election cases must pursue such cases with all deliberate speed to preserve quality of judicial decision making); *Harris v. Purcell, 193 Ariz. 409, PP 17-18, 973 P.2d 1166, 1169-70 (1998)* (finding unreasonable six-week delay even though claim filed within statutory limitations period); *Mathieu v. Mahoney, 174 Ariz. 456, 851 P.2d 81 (1993)* (finding laches applied where plaintiff delayed more than one year after petitions circulated and claims litigated twenty-four hours after complaint filed, thereby prejudicing defendants). And in *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n, 366 F. Supp. 2d 887, 908-09 (D. Ariz. 2005)*, the federal district court concluded laches applied to the plaintiffs' claim, filed weeks before critical election deadlines, because they had had numerous opportunities to raise their claim earlier. Additionally, the court found the defendants, counties, and voters had been prejudiced because they had relied on the validity of the challenged redistricting plan in preparing for the upcoming election. *Id. at 909.*

P65 To the extent these cases suggest a claim may be barred by laches even when the period of delay is brief, we believe they are confined to the election issues they address. The defendants in this case do not assert any change in conditions occurred between June and October 2004 that would support

a finding of undue delay or prejudice. They have therefore failed to sustain their burden of establishing that the doctrine of laches is applicable. The trial court thus abused its discretion in finding that laches barred the plaintiffs' claims, and in granting the motion to dismiss on that ground.

IX. "Retroactivity" of *Lassen II*

P66 Finally, we address what the parties have termed as the "retroactivity" of the Supreme Court's decision in *Lassen II*. The trial court concluded that it was unable on the record before it to determine whether *Lassen II* applied retroactively. The court believed resolution of the issue depended on an easement-by-easement factual assessment to determine whether retroactive application of *Lassen II* would result in inequity. On appeal, the parties essentially dispute whether the Court's holding in *Lassen II* can be used to void all of the 09 easements granted before that decision for which compensation was never obtained.

P67 The plaintiffs acknowledge their claims are based on *Lassen II,* the first case to hold that, under the Enabling Act, the state must compensate the trust for easements conveyed to state entities. And, they concede the 09 easements had been conveyed long before the *Lassen II* decision. Nonetheless, they maintain that a retroactivity analysis of *Lassen II* is not necessary or appropriate because the express language of the Act itself mandates the remedy--"conveyances not made in substantial conformity with the provisions of the Act . . . shall be null and void." In essence, plaintiffs argue that the Act thereby specifies how past conveyances, found later to

violate the Act, must be treated and this court is bound by its express language.

P68 To support this argument, the plaintiffs rely on *Fain Land & Cattle Co. v. Hassell, 163 Ariz. 587, 596, 790 P.2d 242, 251 (1990).* In *Fain,* the question before the court was whether exchanges of school trust lands for non-trust lands violated either the Enabling Act or the Arizona Constitution. *163 Ariz. at 590-92, 790 P.2d at 245-47.* The supreme court concluded the exchanges were explicitly authorized by an amendment to the Enabling Act and therefore did not violate the Act. *Id. at 592, 790 P.2d at 247.* However, the court determined that the exchanges violated Arizona's constitution because it had not been similarly amended. *Id. at 593, 790 P.2d at 248.* Then, in considering whether its decision should be applied retroactively, the court noted that only those conveyances which do not comply with the Enabling Act are void, and therefore it was "not required . . . to nullify past exchanges" because they did not violate the Enabling Act. *Id. at 596, 790 P.2d at 251.* But this statement, which is clearly dicta, does not govern the outcome of this case.

P69 Contrary to the plaintiffs' argument, the Supreme Court's conclusion in *Lassen II* was not predicated on the express language of the Enabling Act. The Court specifically noted:

> The issues here stem chiefly from ambiguities in the grant itself. . . . The Act describes with particularity the disposition Arizona may make of the lands and of the funds derived from them, but it does not directly refer to the conditions or consequences of the use by the State itself of the trust lands for purposes not

> designated in the grant. Of the issues which may arise from the Act's silence, we need now reach only two: first, whether Arizona is permitted to obtain trust lands for such uses without first satisfying the Act's restrictions on disposition of the land; and second, what standard of compensation Arizona must employ to recompense the trust for the land it uses.

385 U.S. at 461. In addressing the requirement for compensation, the Court stated, "[n]othing in the[Act's] restrictions is explicitly addressed to acquisitions by the State for its other public activities; the Enabling Act, as we have noted, is entirely silent on these questions." *Id. at 468.* Unlike the hypothetical violations of the Act addressed by the *Fain* dicta, we are faced with actual conveyances that were not expressly prohibited by the Act at all. Thus, *Fain* gives us little guidance in addressing whether novel interpretations of the Act should be applied retroactively to void the decades-old 09 easements--conveyances upon which both the trust and the state entities have relied.

P70 As we have discussed at length, the Court ultimately concluded that compensation was required to preserve and protect the trust. *Id. at 469-70.* However, notwithstanding this holding, the Court plainly stated it did not address the validity of or the state's obligation with respect to any nonconforming conveyances it acknowledged may already exist. *Id. at 469 n.22.* Indeed, the Court in *Lassen II* itself acknowledged that its decision had created a potential issue regarding the legal status of any easements conveyed to state entities before its opinion. *Id.* But, in declining to address that question, the Court also

left the applicability of the new rule to those conveyances as an open question.

P71 It is uncontested that *Lassen II* represented a significant shift in Enabling Act jurisprudence. As we previously discussed, during the forty years before *Lassen II* was decided, Arizona courts consistently had held that compensation was not required for easements granted to state bodies for highway purposes. *See Conway v. State Land Dep't, 62 Ariz. 248, 249, 156 P.2d 901, 901 (1945)*; *Grossetta v. Choate, 51 Ariz. 248, 250, 75 P.2d 1031, 1031-32 (1938)*; *see also White v. Bateman, 89 Ariz. 110, 114, 358 P.2d 712, 714 (1962)* ("The primary duty of [the supreme court] is to interpret the laws of this state so that the people may know their rights."). *Lassen II* significantly altered the legal landscape. At the time they were granted, under existing case law, no compensation was required for the 09 easements. To invalidate the easements necessarily requires applying the new rule announced in *Lassen II* to events that happened before it was decided, therefore requiring a retroactive application of the case. Thus, we address whether *Lassen II* should be applied retroactively to the 09 easements.

A. Retroactive application

P72 To determine retroactivity, we apply the balancing test set out in *Fain.* [10] Civil opinions pre-

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[10] The federal counterpart to *Fain Land & Cattle Co. v. Hassell, 163 Ariz. 587, 790 P.2d 242 (1990)*, in applying the three-factor test for determining retroactivity is *Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)*. We recognize *Chevron* was overruled in part by *Harper*

(continued on following page)

sumptively apply both retroactively and prospectively unless otherwise stated in the opinion. *Fain, 163 Ariz. at 596, 790 P.2d at 251.* In the absence of express provisions, the presumption of retroactivity can be overcome based on a three-part test, in which courts analyze whether the "decision establishes a new legal principle by overruling clear and reliable precedent . . . [, w]hether retroactive application will further or retard application of the rule . . . [, and w]hether retroactive application will produce substantially inequitable results." *Id.* There is no "magic number" of factors that must weigh in favor of limiting a case to prospective application, but the analysis involves a balancing of all these factors. *Id.; see also Law v. Superior Court, 157 Ariz. 147, 160-61, 755 P.2d 1135, 1149-50(1998).*

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v. Virginia Department of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), insofar as *Chevron* selectively permitted the prospective-only application of a new rule of law. In *Harper* the Court held once it applies a rule retroactively to the parties before it, the rule must be applied retroactively to all cases thereafter. *Id. at 96.* For the first time at oral argument, the plaintiffs argued the Court applied the rule announced in *Lassen II* to the parties. Although the Court applied the rule to restrict the parties' future conduct, it expressly did not apply the rule retroactively to the 09 easements. We therefore apply the *Fain* test for determining retroactivity. *See Fain, 163 Ariz. at 596, 790 P.2d at 251, citing Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 436, 641 P.2d 1275, 1280 (1982)* (approving and applying *Chevron Oil* retroactivity test); see also *Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 753-54, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995)* (reliance on prior case law "insufficient to deny retroactive application of a new legal rule (that has been applied in the case that first announced it)").

1. Reliance Factor

P73 For almost forty years before *Lassen II* was decided, the state had granted approximately 900 easements--all in reliance on the three Arizona Supreme Court cases authorizing this practice. *See Lassen I, 99 Ariz. 161, 407 P.2d 747 (1965)*; *Conway, 62 Ariz. 248, 156 P.2d 901*; *Grossetta, 51 Ariz. 248, 75 P.2d 1031.* The Court's decision in *Lassen II* undoubtedly established "a new legal principle by overruling clear and reliable precedent." *Fain, 163 Ariz. at 596, 790 P.2d at 251.* Thus, this factor weighs against retroactive application of *Lassen II.*

2. Purpose Factor

P74 The next factor is the effect retroactive application would have on the application of the rule announced in the decision. This includes consideration of the history, purpose, and effect of the rule. *Fain, 163 Ariz. at 596, 790 P.2d at 251.* The rule announced in *Lassen II* was designed to protect state land trust assets from depletion and ensure that beneficiaries receive their full benefit from the trust. *385 U.S. at 469-70.* Given the number of these 09 easements and length of time they existed before *Lassen II,* this factor weighs in favor of retroactive application, serving the Enabling Act's intent to benefit the beneficiaries.

3. Inequity Factor

P75 The final factor "focuses on the injustice or hardship that would result from retroactive application of the new rule." *Fain, 163 Ariz. at 597, 790 P.2d at 252.* The defendants have gone to great lengths to demonstrate the injustice and hardship of a retroactive application of *Lassen II.* As in *Fain,* there are

"several hundred [transactions that] have been completed over the years, affecting thousands of acres," and, in this case, almost every county and municipality in the state. *Id.* And, just as in *Fain*, if we were to apply *Lassen II* retroactively, "[i]t would be impossible to undo all the [conveyances] that have transpired and put everyone back in his original position." *Id.*

P76 By voiding the conveyances, each of the approximately 900 easements would automatically revert to the State Land Department until the parties could reach some type of resolution and the easements could presumably be reinstated. During this period, the State Land Department would bear the responsibility for any public roadways and improvements located on the easements, a function it is ill-equipped to perform. The resultant administrative difficulties could unquestionably have an impact on the Arizona citizens who use these roadways on a daily basis. As our supreme court noted in *Fain*, "[i]f applied retroactively, this opinion might inflict great hardship on many innocent people, and perhaps disrupt the economy of the state." *Id.* Therefore this factor does not support retroactive application of *Lassen II*.

P77 Giving due consideration to the purposes behind the rule announced in *Lassen II*, and the fact that the Supreme Court explicitly left open the question of retroactivity, the balance of factors weighs heavily in favor of applying *Lassen II* prospectively only. We thus conclude *Lassen II* does not apply retroactively. Therefore, the plaintiffs are not entitled to the relief they seek and have failed to

state a claim upon which relief can be granted. *See Ariz. R. Civ. P. 12(b)(6).*[11]

X. Conclusion

P78 The plaintiffs have standing and have asserted valid claims for breach of trust and declaratory relief. They have not stated a valid claim that would entitle them to an accounting, and their claim for monetary relief against the State Defendants is dismissed. Neither the statute of limitations nor laches bars the plaintiffs' claims, and Peoria and Scottsdale are not protected from liability by the bona fide purchaser for value doctrine. Additionally, *Lassen II* does not apply retroactively to require compensation for the 09 easements. Although we disagree with the trial court's reasoning, we agree with the result, and therefore affirm. *See Wolfinger v. Cheche, 206 Ariz. 504, P 58, 80 P.3d 783, 796 (App. 2003)* ("We may affirm a trial judge for a different reason if we conclude that although the entry of judgment on the stated grounds was inappropriate, other reasons appropriately call for judgment as entered.").

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[11] Because we conclude that *Lassen II* may not be applied retroactively to require compensation for the 09 easements, we need not address the argument of Peoria and Scottsdale that because their predecessor-in-interest, Maricopa County, was a bona fide purchaser for value, they are innocent third parties, and the plaintiffs' only means of seeking redress should be against the trustee.

XI. Attorney Fees

P79 As the prevailing party on appeal, the defendants have requested attorney fees and costs on appeal pursuant to *A.R.S. § 12-341.01*. However, *§ 12-341.01* applies to contract actions and is not an appropriate basis for fees in this case. *See In re Wilcox Revocable Trust, 192 Ariz. 337, P 21, 965 P.2d 71, 75 (App. 1998)* ("We will award no attorney's fees where no [proper] basis for the award is cited to us."). We therefore deny the requests for fees.

GARYE L. VASQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-020078 **01/12/2007**

HONORABLE RUTH H. HILLIARD
CLERK OF THE COURT
L. Gilbert Deputy

JEFF NEWMAN, et al. TIMOTHY M HOGAN
v.
MARK WINKLEMAN, et al.

MARY MANGOTICH GRIER
KENNETH A ANGLE
CRISS E CANDELARIA
NANCY J DAVIS
EDWARD P FEHELEY
GLENN M GUSTAFSON
BRITT W HANSON
CYNTHIA ODOM
LUIS F PARRA
LANCE B PAYETTE
MATTHEW P PODRACKY
DEREK D RAPIER
CHRIS M ROLL
TOBIN ROSEN
AMY SCHWARTZ

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MINUTE ENTRY

The following Motions to Dismiss have been under advisement. Having considered all memoranda submitted and the arguments of counsel, the Court finds and orders as follows.

1. As to the Motion to Dismiss filed by the Towns of Carefree, Gila Bend, Marana and the Cities of Globe, Phoenix, Sierra Vista, Glendale, Flagstaff and Tempe (joined by defendants State of Arizona, Mark Winkleman, State Land Commissioner, Arizona State Land Department, City of Peoria, Mohave, Yuma, Pinal, Pima, Yavapai and Maricopa Counties, and Maricopa County Flood Control District), these

defendants seek relief based on Rule 12(b)(6), ARCP, i.e., that plaintiff has failed to state a claim upon which relief can be granted. These defendants urge that plaintiffs' claim should be dismissed because (1) it is barred by laches and (2) that Lassen v. Arizona, 99 Ariz. 161, 407 P.2d 747 (1965) cannot be applied retroactively. The Court notes that these Motions to Dismiss all relate to what is referred to as the 09 easements, the more than 900 easements and rights-of-way that had been granted before the 1967 decision in Lassen for which plaintiffs seek defendants to make adequate compensation (Count II). As an alternative claim for relief, plaintiffs have requested in Count III that the Court declare that the right of way easements are void. The Court notes that plaintiffs have not sought rescission in this case, as argued by defendants. Instead, plaintiffs seek payment of the fair market value of the property granted before 1967 to defendants.

Until the Lassen decision, the law in Arizona had been that easements granted by the State Land Department to governmental entities primarily for road construction did not require compensation for the use of this state trust land. In 1967 the US Supreme Court held that compensation must be paid by Arizona to the trust..." for the full appraised value of any material sites or rights -of- way " on or over state trust land by any governmental entity. Lassen v. Arizona, 385 U.S. 458, 470 (1967). In addition, the Court stated that any easements issued without compensation to the State of Arizona violated the Enabling Act.

These defendants first argue that plaintiffs are barred from bringing this action by the equitable doctrine of laches. Laches is an equitable doctrine

and applies when the party asserting the defense establishes that, because of delay or lapse of time, the party has been injured or has changed its position in reliance on the other party's inaction. State of AZ, ex rel. the Dept. of Economic Security v. Vallejo, 194 Ariz. 201, 979 P.2d 529 (1999). In order to succeed on this defense, defendants must establish that plaintiff unreasonably delayed in bringing this action and that defendants were disadvantaged or prejudiced by the delay. Tovrea v. Umphress, 27 Ariz. App. 513, 556 P.2d 814 (1976).

As to the issue of delay, this action was brought thirty seven years after the 1967 U.S. Supreme Court decision in Lassen. Defendants argue that the State Land Department could have been aware of the requirement that compensation be received for all easements and rights-of-way granted as soon as the U.S. Supreme Court ruled in Lassen in 1967. Although plaintiffs urge that this Court should find that laches does not apply for the same reasons that this matter was not dismissed due to the running of the statute of limitations, the Court finds that the argument is different here. The Statute of Limitations argument focused on the State's knowledge of the 09 easement issue after a letter was sent by plaintiff's counsel to the Arizona State Land Commissioner on June 4, 2003. That Motion to Dismiss focused on a different time frame than the time frame argued in this Motion to Dismiss based on laches and the prior ruling is not determinative of this pending issue.

Plaintiff argues that the doctrine of laches does not apply in this case because the conveyances at issue here (the 09 Easements) were done without consideration, thereby violating the Enabling Act; as

a result plaintiffs argue that these conveyances were void ab initio and no legal interest in those easements and rights-of-way ever passed to the governmental entities. This Court finds, however, that this is an allegation only and this allegation is not established at this stage of the litigation. As a result, the Court finds that, by itself, this allegation is not sufficient to preclude consideration of the defense of laches.

In addition, plaintiffs urge that their efforts to obtain compensation for those easements cannot be dismissed based on laches since the State Trust Fund's sovereign title to the rights-of way and 09 Easements is at issue. However, this argument is not persuasive since plaintiffs have made it clear in their memorandum that they are not seeking to have title to the 09 Easements be returned to the State Trust Fund; instead plaintiffs have repeatedly stated that they are seeking defendants to compensate the Trust for their easements instead of returning the property to the state.

The Court finds that the defense of laches is applicable to the facts of this case and the Court will now consider whether defendants have established the elements of proof required for such relief.

As to unreasonable delay, plaintiffs have urged that there has not been unreasonable delay from the time that plaintiffs became aware of the 09 Easements and the lack of consideration paid for said easements and rights-of-way. Defendants, however, urge that the requirement of such compensation was known as of 1967 when the U.S. Supreme Court made its decision in Lassen v. Arizona. Plaintiffs have not countered this argument but focus on the

time frame of June, 2003 when plaintiffs' counsel wrote to the Arizona Land Commissioner about the Lassen issue.

The Court finds that plaintiffs have not provided any reasonable explanation as to why this issue was not raised for thirty seven years. The Court is persuaded that this is an unreasonable delay.

In addition, defendant must establish that the unreasonable delay has resulted in prejudice to defendants. It is undisputed that land values have risen dramatically in Arizona since 1967. Determining the appraised value of the land involved in the 09 Easements will result in significantly higher valuations than if plaintiffs had presented this claim shortly after Lassen was decided.

The Court finds that this constitutes significant prejudice against defendants. The Court is not persuaded by plaintiffs' argument that requiring defendants to make payments in accordance with the Enabling Act is a mere hardship, not prejudice; the prejudice arises from the significantly higher valuation that will be placed on the land conveyed by the 09 Easements and rights-of-way because of the passage of over forty years since the Arizona Supreme Court first declared that such payments were required in Lassen.

The Court is satisfied that defendants have established that laches applies in this case and have proven both elements of laches.

On this basis it is ordered granting these defendants' Motion to Dismiss.

As to defendants' argument regarding the retroactive application of Lassen, this issue is not a critical determination in light of the Court's ruling above. However, the Court will address the arguments of counsel for the sake of completeness.

Defendants State of Arizona, Winkleman and Arizona State Land Department urge that this issue cannot be decided at this time and should not be the basis for dismissal of plaintiffs' Complaint. While the Court does not agree with its reliance on West Farm Bureau General Ins. Co., ___ NW 2d ___, 2006 WL 2355844 (Mich. App. Aug. 15, 2006), the Court agrees that the validity of the individual easements at issue in this case must be looked at individually and all relevant equitable and policy considerations must be addressed separately.

Plaintiffs urge that the issue of retroactive application of Lassen is not relevant because Lassen makes it clear that the 09 Easements were null and void since those easements violated the Enabling Act. According to plaintiffs, if these conveyances were null and void when made, they cannot be revived by court action. United Bank & Trust Company v. Joyner, 40 Ariz.229, specifically stated in Lassen that its decision did not address or decide whether any conveyances made before its decision were void ab initio.

Both plaintiffs and defendants urge that the three part test set out in Fain Land and Cattle Company v. Hassell, 163 Ariz. 587, 790 P.2d 242 (1990) must be considered to determine if Lassen should be applied prospectively only, or retroactively as well. The Supreme Court in Fain reiterated that an opinion

will be given both retroactive and prospective application unless specified otherwise.

The Supreme Court reiterated the three-part test set out in Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982) that is to be used to determine if a court opinion is to be given prospective application only. The factors to be considered are:

1. Whether the decision establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed (the "reliance" factor);
2. Whether retroactive application will further or retard operation of the rule, considering the prior history, purpose and effect of the rule (the "purpose" factor);
3. Whether retroactive application will produce substantially inequitable results (the "inequity" factor).

163 Ariz. at 596.

As to the first requirement, the "reliance" factor, the Court finds that Lassen overrules long standing precedent in Arizona regarding the interpretation of the Enabling Act and the allowed use of state trust land without compensation. The Court finds that defendants' reliance on two prior Arizona Supreme Court cases that were clear and reliable precedent. Accordingly, this Court finds that the Lassen decision established a new legal principle by overruling clear and reliable precedent.

As to the "purpose" factor, i.e. whether retroactive application would further or retard operation of the rule in Lassen, this Court finds that defendants have not established that retroactive application would have any impact on the operation of the rule. As to the "inequity" factor, i.e., whether retroactive application would produce substantially inequitable results, the Court finds that this cannot be resolved at this time and by retroactive application of Lassen.

As a result, the Court could not make a determination at this time as to whether Lassen should be applied retroactively or not.

2. As to defendant City of Peoria's Motion to Dismiss and its Joinder in Other Cities' Motion to Dismiss Regarding Laches (joined by defendants Winkleman, Arizona State Land Department and State of Arizona, Maricopa County and Flood Control District of Maricopa County, Pinal County, and City of Scottsdale), Peoria urges that plaintiffs lack standing to enforce the provisions of the Arizona Enabling Act and, further, Peoria is a bona fide purchaser for value, thereby complying with all applicable laws.

As to standing, Peoria urges that plaintiffs have no specific right to income from state trust lands that is not shared by the public-at-large and, therefore, lack standing to pursue this action. The Court finds that Proposition 300 and resulting legislation has impacted the method by which public schools are funded and has created a direct legal right in plaintiffs to receive income from state trust lands. Further, the Court is not persuaded that Schalkenbach Foundation et al. v. Lincoln Foundation, Inc. et al., 208 Ariz. 176, 91 p.3d 1019 (App. 2004)

is persuasive or applicable to the facts of this case. The Court notes that Schalkenbach Foundation involved a charitable trust and defendant Peoria has not presented any Arizona authority establishing that a trust created by the Enabling Act is a "charitable" trust. Further, Board of Education of the City of Albuquerque v. School Dist. No. 5, 21 N.M. 624, 157 P. 668 (1916) is not on point and does not address the issue of standing. The second New Mexico case relied on by Peoria, Forest Guardians v. Powell, 130 N.M. 368, 24 P.3d 803 (App. 2001), and differs factually from the instant case and is not persuasive.

Accordingly, the Court finds that plaintiffs' rights to said income is different than the rights of the public-at-large. The Court finds that plaintiffs have standing to proceed with this action.

As to Peoria's claim that Maricopa County, its predecessor-in-interest, acquired its right of- way as a bona fide purchaser for value, the Court notes that Peoria was a successor-in -interest to Maricopa County and Maricopa County obtained the easements at issue in 1960. At that time easements were conveyed in exchange for the increase in value to the land without money being exchanged, a practice approved in two Arizona Supreme Court decisions before Lassen, Grossetta v.Choate, 51 Ariz. 248, 75 P.2d 1031 (1938); Conway v. State Land Department, 62 Ariz. 248, 156 P.2d 901 (1945). This practice was approved based on the understanding that construction of roadways across public lands interspersed with private property would enhance the value of the public land as recognized in Ross v. Wyoming, 30 Wyo. 433, 222 P. 3 (1924). Peoria urges that Maricopa County reasonably relied on the State Land

Department (as Trustee) to follow then existing law; therefore plaintiffs are not entitled to proceed against Peoria for compensation but their action lies against the Trustee.

However, this Court finds that Peoria's reliance on Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947) is not well taken. The Court in Murphy held that if a conveyance violated the Enabling Act the State was permitted to deny the validity of the conveyance even if made to a bona fide purchaser.

It is ordered denying City of Peoria's Motion to Dismiss for the reasons stated above but it is ordered granting its joinder and Motion to Dismiss as to Laches.

3. As to defendant Maricopa County's and Flood Control District of Maricopa County's Separate Motion to Dismiss (joined by Pinal and Yuma Counties and the Magma Flood Control District), these defendants urge that plaintiffs' lack subject matter jurisdiction and fail to state a claim upon which relief can be granted.

These defendants argue that there is no justiciable controversy because the relief sought by plaintiffs is impossible or impractical and, therefore, plaintiffs' claims are moot. The Court is not so persuaded.

As to these defendants' argument that the Complaint fails to state a claim against them, the Court notes that these defendants were joined as necessary parties. The Court is not persuaded that further amendment of claims is needed.

It is ordered denying these defendants' Motion to Dismiss.

SUPREME COURT OF ARIZONA

MAYER UNIFIED SCHOOL DISTRICT and GADSDEN ELEMENTARY SCHOOL DISTRICT, Plaintiffs/Appellants, vs. MARK WINKLEMAN, in his capacity as State Land Commissioner, THE ARIZONA STATE LAND DEPARTMENT, the State of Arizona; APACHE COUNTY, COCHISE COUNTY, COCONINO COUNTY, GRAHAM COUNTY, GREENLEE COUNTY, MARICOPA COUNTY, MOHAVE COUNTY, NAVAJO COUNTY, PIMA COUNTY, PINAL COUNTY, SANTA CRUZ COUNTY, YAVAPAI COUNTY, YUMA COUNTY, MARICOPA COUNTY FLOOD CONTROL DISTRICT, ARIZONA DEPARTMENT OF TRANSPORTATION, TOWN OF CAREFREE, CITY OF TUCSON, CITY OF FLAGSTAFF, TOWN OF GILA BEND, CITY OF GLENDALE, CITY OF GLOBE, MAGMA FLOOD CONTROL DISTRICT, TOWN OF MARANA, CITY OF PEORIA, CITY OF PHOENIX, CITY OF SCOTTSDALE, CITY OF SIERRA VISTA, and CITY OF TEMPE. Defendants/Appellees.	Arizona Supreme Court No. CV-08-0225-R Court of Appeals Division Two No. 2 CA-CV 07-0126 Maricopa County Superior Court No. CV2004-020078 ORDER

MAYER UNIFIED SCHOOL DISTRICT AND GADSDEN ELEMENTARY SCHOOL DISTRICT,

Plaintiffs/Appellants/ Cross-Appellees,

vs.

CITY OF SCOTTSDALE,

Defendant/Appellee/ Cross-Appellant.

On March 2, 2009, the Court received the "Plaintiffs/Appellants' Motion for Reconsideration." After consideration,

IT IS ORDERED denying the Plaintiffs/Appellants' Motion for Reconsideration.

DATED this 9th day of March, 2009.

REBECCA WHITE BERCH

Duty Justice

TO:

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Honorable Ruth Harris Hilliard, Judge, Maricopa County Superior Court

Honorable Barbara R. Mundell, Presiding Judge, Maricopa County Superior Court